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Supreme Court of the United States

OCTOBER TERM, 1963

No. 56

HONORABLE FRANCIS L. VAN DUSEN, JUDGE, ETC., ET AL., PETITIONERS,

vs.

ROBERTA BARRACK, ADMINISTRATRIX, ETC., ET AL.

No. 80

FRANCIS L. VAN DUSEN, UNITED STATES DISTRICT JUDGE, ET AL., PETITIONERS,

vs.

ROBERTA BARRACK, ADMINISTRATRIX, ETC., ET AL.

ON WRITS OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

NO. 56—PETITION FOR CERTIORARI FILED JANUARY 11, 1963
NO. 80—PETITION FOR CERTIORARI FILED FEBRUARY 21, 1963
CERTIORARI GRANTED APRIL 15, 1963

SUPREME COURT OF THE UNITED STATES

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[fol. 1]

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions Nos. 28664, 28741, 28762, 28763, 28764, 28788, 28789, 29099, 29100, 29159, 29160, 29161, 29162, 29274, 29275, 29615, 29616, 29724, 29768, 29881, 29882, 29883, 29884, 29901, 30078, 30079, 30200, 30230, 30257, 30258, 30259, 30260, 30263, 30266, 30284, 30288, 30289, 30300, 30301, 30302, 30303, 30304, 30305, 30306, 30343, 30344 and 30346 and Nos. 321, 323, 325, 327, 329, 335 and 375 of 1961 in Admiralty

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SIDNEY W. POPKIN,

v.

EASTERN AIR LINES, INC., and LOCKHEED AIRCRAFT CORP., and GENERAL MOTORS CORPORATION

and succeeding cases captioned in the orders of 10/17/61 (Document No. 24 in C. A. 28664) and 11/1/61 (Document No. 7 in C.A, 29724), except Civil Actions Nos. 30390 and 30391

[fol. 2]

OPINION SUR MOTIONS TO TRANSFER

VAN DUSEN, J. April 6, 1962

These 55 cases,[1] involving fatal and, as to three plaintiffs, non-fatal injuries suffered when an Electra airplane

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[1] There are 28 plaintiffs involved in these 55 cases, since 13 plaintiffs have filed two suits in this court and 7 plaintiffs have filed three cases in this court resulting from the injuries received in the October 4, 1960, airplane accident at Boston, Mass. Only one of the 114 cases in the Massachusetts District Court is an admiralty action, whereas 7 of these cases are suits in admiralty brought by the same parties who have also filed Civil Actions in this court.

Wherever "plaintiffs" is used, it includes libellants and wherever "defendants" is used it includes respondents.

One of these cases has already been transferred due to improper venue (C. A. 30307).

manufactured by Lockheed, having engines made by General Motors, and owned and operated by Eastern, crashed approximately one minute after take-off in Boston Harbor on October 4, 1960, are before the court on Motions to Transfer under 28 U.S.C.A. §1404(a). There are 114 similar cases pending in the United States District Court for the District of Massachusetts (see Document No. 30 in C.A. 30078). The record in these cases (see, particularly, statements of Lee S. Kreindler, Esq. at the argument) indicates that the primary basis for liability on which the plaintiffs presently rely is alleged fault of the defendants resulting in bird ingestion by the turbo-prop engines of the plane involved in this suit, as well as in engines of other planes using the Logan International Airport, Boston, at about the time of the accident.

In *Jurgelis* v. *Southern Motors Express*, 169 F. Supp. 345 (E.D. Pa. 1959), this court said:

> "In Norwood v. Kirkpatrick, 1955, 349 U.S. 29, . . . the Supreme Court, in discussing the relation of 28 U.S.C.A. §1404(a) to the doctrine of forum non conveniens as recognized by the Supreme Court in Gulf Oil Corp. v. Gilbert, 1946, 330 U.S. 501, . . . said at page 32 . . . :
>
> "' . . . we believe that Congress, by the term "for the convenience of parties and witnesses, in [fol. 3] the interest of justice," intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader.'
>
> "It appears, therefore, that under the present state of the law, the factors to be considered by a court in determining whether or not to transfer the action under §1404(a) are established by the Gulf Oil Corp. case,[2]

[2] In the *Gulf Oil Corp.* v. *Gilbert case*, supra, the court said at pp. 508-9:

"... An interest to be considered, and the only likely to be most pressed, is the private interest of the litigant. Important consid-

and the degree of discretion to be exercised by the court is established by the Norwood case."

The last sentence quoted above was approved by Chief Judge Biggs, sitting specially in this court, in *Medich* v. *American Oil Company*, 177 F. Supp. 682, 683 (E.D. Pa. 1959). See, also, *All States Freight* v. *Modarelli*, 196 F. 2d 1010 (3rd Cir. 1952), where the court said at page 1011:

"The statute limits the privilege of the plaintiffs to have his lawsuit tried in the forum of his choosing if [fol. 4] he can there get jurisdiction over the defendant. The purpose of the limitation is clearly to make the inevitably uncomfortable (for the litigant) judicial process cheaper and more convenient and, if possible, more prompt."

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erations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

"Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

After consideration of the record in these cases, the undersigned has concluded that transfer is required under 28 U.S.C.A. §1404(a), as follows:

I. Convenience of the Parties

In this case, plaintiffs claim their convenience would be served by a trial in this District and the defendants claim that it would be more convenient for them to have these cases tried in the District of Massachusetts.[3] The burden on the survivor-plaintiffs of presenting their damage testimony in the transferee District has not been overlooked, but this is a burden often falling upon persons who, having elected to travel away from home, are involved in accidents and must have been considered by Congress in enacting 28 U.S.C.A. §1404(a). None of the affidavits allege that any of the plaintiffs is impecunious, nor is their financial condition stated in the record.

II. Convenience of Witnesses

The record makes clear that the District of Massachusetts will be more convenient for the presently known witnesses on the issues of liability and of degree of culpa- [fol. 5] bility of the defendants.[4] The Collins Affidavit

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[3] There is nothing in 28 U.S.C.A. §1404(a) which precludes transfer because the plaintiff is a resident of the transferor District. See, for example, *Norwood* v. *Atlantic Coast Line RR. Co.*, C.A. 15810, p. 4 of opinion of then Chief Judge (now Senior Judge) Kirkpatrick dated 7/12/54, petition for writ of mandamus and prohibition denied (3rd Cir., No. 11,364, on 7/16/54), aff'd. sub. nom. *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955); *Harry Winston, Inc.* v. *Zale Jewelry Company*, 191 F. Supp. 686 (S.D. N.Y. 1961); *Huff* v. *Nashville, Chattanooga & St. Louis Ry.*, 88 F. Supp. 735 (S.D.N.Y. 1949). As stated in *Brown* v. *Woodring*, 174 F. Supp. 640, 645 (M.D. Pa. 1959):

> "'Defendant's mandatory margin for victory . . . need not be an overwhelming one.' A court should not hesitate to disturb plaintiff's choice of forum if the three statutory factors dictate transfer."

[4] The Massachusetts Death Act, in relevant part, provides:

> "A person who (1) by his negligence causes the death of a person . . ., or (2) by wilful, wanton or reckless act causes

(Document No. 31 in C.A. 28664) allege that (a) all but six of the 47 eye witnesses to the accident known to General Motors reside in the District of Massachusetts and within 25 miles of Boston (par. 12);[5] (b) four of ten survivors of the crash reside in the District of Massachusetts and within 60 miles of the center of Boston;[6] (c) four employees of the Logan Airport who prepared the plane for flight reside in the vicinity of Boston; (d) seven operators of the control tower at Logan International Airport, who were eye witnesses to the aircraft's flight and crash and who would know the time of the take-off and crash, reside within 25 miles of center city Boston (see par. 15 of Document No. 31 in C.A. 28664); (e) all but one of the six experts who first examined the bodies of the dead birds reside within twelve

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death of a person . . ., or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his wilful, wanton or reckless act causes the death of a passenger . . ., shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability. . . . A person shall be liable for the negligence or the wilful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act, except that the damages are to be assessed with reference to the degree of culpability of his agents or servants."

Mass. Ann. Laws, c. 229, §2 (Suppl. 1961).

[5] The second sentence of this paragraph states: "These witnesses observed the takeoff, flight and crash of the aircraft and would be able to testify to its flight path, describe the nature of its flight and crash and furnish testimony relevant to the time interval between takeoff and crash."

[6] In par. 13 of this Affidavit, it is alleged that these witnesses would be able to testify as to the course of the plane's flight, the sound of its engines, and the results of the crash. In par. 4 of the unsworn answer to the Motions to Transfer filed by plaintiffs in Civil Actions Nos. 28664, 29881, 29882, 29883, 29884, 29901, 30300, 30307 and 30344 and Nos. 321, 323, 325, 327, 329, 335 and 337 of 1961 in Admiralty, it is alleged that Major Sylvester Koenig resides in Greenville, S. C. (Document No. 35 in C.A. 28664), rather than Falmouth, Mass., as alleged in this paragraph 13, but the residence of this survivor of the crash is not stated in any affidavit filed by plaintiffs.

miles of center city Boston and the sixth such expert resides in New Hampshire, approximately 60 miles from Boston (see par. 17 of Document No. 31 in C.A. 28664); and (f) five other potential witnesses having knowledge of the [fol. 6] presence of birds at the airport, and some of whom discovered dead birds at the airport, reside within 25 miles of Boston (see pars. 16 and 18 of Document No. 31 in C.A. 28664).[7] Also, it is clear that it will be more convenient for such witnesses if there is to be one trial, rather than several, and if the discovery can be conducted under the supervision of one court.[8] Cf. *MacAlister* v. *Guterma*, 263 F. 2d 65, 68-70 (2nd Cir. 1958).

Plaintiffs have not filed any affidavits contradicting the above sworn allegations, but have emphasized, generally, without listing any additional, specific witnesses in their affidavits (except for six individuals listed without specifying the area of their testimony in Document No. 35 in C.A. 28741 and five individuals listed as damage witnesses for one plaintiff in Document No. 29 in C.A. 30078), that most of their compensatory damage witnesses come from this district or near it.[9] Experience in this and other Districts indicates that, once the issues of liability have been determined, relatively few of a large group of cases such as these, resulting from one accident, go to trial on the

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[7] The Wickenhaver Affidavit lists some of the same witnesses as those referred to above in the Collins Affidavit. See Exhibit B to Document No. 30 in C.A. 28664. In par. 8 of that Affidavit, there is named an additional witness as to the birds living in the transferee District (John J. Phelan, of Winthrop, Mass.).

[8] Since the United States of America is one of the defendants, the only District in which all the actions can be consolidated for trial is Massachusetts. See 28 U.S.C.A. §1402(b), providing that the United States may only be sued "where the plaintiff resides, or wherein the act or omission complained of occurred."

[9] For example, the McConnell Affidavit (Document No. 29 in C.A. 30078) lists six compensatory damage witnesses that plaintiff Ward wishes to call "from this area" and does not deny that he was also hospitalized in the Boston area or that medical witnesses from that area could present helpful evidence on the issue of damages—see, also, Affidavits attached to Document No. 35 in C.A. 28664 and Documents Nos. 34 and 35 in C.A. 28741.

damage issues. Furthermore, as indicated below, there are several legal hurdles the personal representative plaintiffs have to overcome before compensatory damages become pertinent in their cases.[10]

Some plaintiffs also stated in their affidavits that they seek to establish that the accident occurred as the result of [fol. 7] negligent design and testing of the engines by General Motors, negligent design and testing of the aircraft by Lockheed, negligent testing of the aircraft, as well as negligent training and physical examinations of the flight personnel, by Eastern, and negligence of the Government in execution of its responsibility for flight safety. See par. 8 of Document No. 29 in C.A. 30078. At the argument, it was admitted that plaintiffs hoped that the Government agency investigating the crash would be able to show faulty design and testing of the aircraft and its engines, but no definite finding to this effect has been made over 18 months after the crash. Hence, there is nothing specific on the record to show that any large number of witnesses from outside the Boston area, and for whom the transferor District would be more convenient than the transferee District, will be required for the trial of the above-mentioned issues of liability and degree of culpability. Employees of the defendants from California and Indiana, referred to at page 10 of the Kreindler Affidavit, being Document No. 12 in C.A. 29724, would not be substantially inconvenienced any more by a trial in Philadelphia than one in Boston,[11] but it is clear that they will be inconvenienced by having to testify at trials in both places, as opposed to one trial in Boston (see footnote 8 above, showing that the transferee District is the only place where there can be a single trial). Employees of the Civil Aeronautics Board, Bureau of Safety, will similarly have to testify in the District of Massachusetts in any event

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[10] If agreement on damages cannot be secured in the cases against the Government, it is most probable that the Government would agree to a determination of the damage issues by this court.

[11] A trial in this District would be less convenient for defendants since it would require them to transport their employees to testify at least twice from the west or mid-west to the eastern part of this country.

and, if the transfer of these 55 cases is denied, they will have to attend another trial in this District.

III. The Interest of Justice

The interest of justice requires the transfer of these cases to the transferee District for these reasons, among others:

[fol. 8]

(1) Consolidation of all the cases arising from this accident for purposes of proceedings before trial is likely to procure fairer and more orderly trials for all litigants and save needless time and expense for the public, including jurors, and other litigants whose cases are awaiting trial.

See *MacAlister* v. *Guterma*, supra, at 68-70; *O'Donnell* v. *Watson Bros. Transportation Company*, 183 F. Supp. 577 (N.D. Ill. 1960); and cases cited in those cases. With reference to the argument in the attached letter of January 11, 1962 (based on a letter from the Clerk of the Massachusetts District dated January 9, 1962, which is also attached), that "there is nothing to be gained administratively by the transfer of these matters to Boston," the United States District Court for the District of Massachusetts has informed the undersigned that all the cases arising out of this accident have been assigned to one judge, who is handling all such cases for purposes of proceedings prior to trial and will consider possibilities of severance of issues for trial, as well as consolidation for trial, at the appropriate time.[12] As pointed out in *Kelly* v. *Greer*, 295 F. 2d 18, 21 (3rd Cir. 1961), even after a consolidation order has been entered, it "does not freeze the future conduct of the litigation."

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[12] Paragraph 8 of the Lockwood Affidavit (Document No. 30 in C.A. 30078) refers to the normal progress of a case in the United States District Court for the District of Massachusetts, whereas the court has informed the undersigned that this case is being treated as a protracted case and not "in the normal course." See Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (1960).

(2) The conduct of as few trials as feasible on the issues of liability and culpability.

The purpose of the Federal Rules of Civil Procedure was to encourage consolidation wherever this was fair and possible. See *Sutcliffe Storage & Warehouse Co.* v. *United States*, 162 F. 2d 839, 851 (1st Cir. 1947); *United States* v. *Knauer*, 149 F. 2d 519 (7th Cir. 1945), aff'd. 328 U.S. 654 (1946); cf. *Walker* v. *Loop Fish & Oyster Co.*, 211 F. 2d 777, [fol. 9] 780-1 (5th Cir. 1954); *Howey* v. *Yellow Cab Co.*, 181 F. 2d 967, 973 (3rd Cir. 1950), aff'd. sub. nom. *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951). In the *Howey case*, supra, the court said at page 973:

> "Surely the stricture of the Sherwood case . . ., would not serve to require second, separate trials with the United States as the sole defendant, the issue being one of contribution, for such second, separate trials would embrace the same evidence as that already received and would be conducted before the same judge."

Federal trial courts have consistently recognized the fairness and desirability of consolidating cases for trial, particularly on the issue of liability. See *Weitort* v. *A. H. Bull & Company*, 192 F. Supp. 165 (E.D. Pa. 1961); *Hassett* v. *Modern Maid Packers, Inc.*, 23 F.R.D. 661 (D. Md. 1959); *Polak* v. *Koninklijke Luchtvaart Maatschappij, etc.*, 19 F.R.D. 87 (S.D.N.Y. 1956); and cases cited in those cases. In the *Polak case*, supra, the court said at page 88:

> "The advantages of consolidating multiple claims arising from a single accident outweigh even the considerations requiring strict enforcement of the rules on jury demand. . . . (Citing case.) Recent experience with the trial of such consolidated claims in this court indicates that almost invariably the only evidence peculiar to each claim is that relating to damages. Most of the trial court's time is consumed by the trial issues common to all of the cases. Considerations of expense as well as the convenience of witnesses, litigants and the Court, and the expeditious dispatch of judicial business, impel consolidation under such circumstances."

In the *Hassett case*, supra, involving five actions arising out of one accident, the court said at page 664:

> "... it will save time for parties, witnesses, counsel and courts; to have the entire matter disposed of at one trial. ...
>
> [fol. 10] "The five cases should be consolidated for trial under Rule 42(a), but, as permitted by Rule 42(b), the jury shall first hear the evidence on the issue of liability and decide that issue for all the cases."

It is neither fair nor just that there should be a different liability result for some of these plaintiffs than there is for others. Transfers under 28 U.S.C.A. 1404(a) have resulted from the desirability of consolidating the transferred cases for trial with other similar cases pending in the transferee District. See *A/S Dampskibsselskabet Svendbord* v. *United States*, 116 F. Supp. 603 (E.D. Tex. 1953), where the court said at page 606:

> "However, a more important consideration, it would seem, is that all of the facts and circumstances necessary to determine the rights of the parties will have to be presented both there and here at different times, and it is possible that the two Courts could reach conflicting conclusions; whereas if the case filed here is transferred, it can be consolidated with those in the Southern District of New York and all rights determined in a single trial without the possibility of such a conflict."

See, also, *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19, 21 (1960); *Cressman* v. *United Air Lines*, 158 F. Supp. 404 (S.D.N.Y. 1958); *Winsor* v. *United Air Lines*, 153 F. Supp. 244 (E.D.N.Y. 1957).

Recently, the United States Court of Appeals for the Second Circuit has emphasized the desirability of consolidation of separate actions involving common questions of law and fact for purposes of pre-trial and trial under the supervision of one judge or master. See *MacAlister* v. *Guterma*, supra. In *Crosley* v. *Hazeltine Corporation*, 122 F. 2d 925 (3rd Cir. 1941), the United States Court of Appeals for the Third Circuit said at page 930:

> "It is of obvious importance to all the litigants to have a single determination of their controversy, rather than [fol. 11] several decisions which if they conflict may require separate appeals to different circuit courts of appeals. No party has a vested right to have his cause tried by one judge rather than by another of equal jurisdiction. . . . The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us to seek actively to avoid the waste of judicial time and energy. Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties."

(3) The District of Massachusetts is the only federal jurisdiction where all defendants can be served.

The defendants (particularly the United States of America and Eastern Air Lines, Inc.) emphasized at the argument that they wish to join the Massachusetts Port Authority (owner and operator of the Boston Airport) as a third-party defendant and service can only be obtained on that entity in the District of Massachusetts (see page 4 of Kreindler Affidavit, Document No. 12 in C.A. 29724). This court has consistently recognized that the ability to join a third-party defendant in the transferee forum is a consideration in favor of transfer. See *Allied Petro Products Incorporated, etc.* v. *Maryland Casualty Company*, C.A. No. 30180, and cases cited at pages 3-4 of Opinion of 12/22/61 (Document No. 7). The unfairness which can result from different results in separate trials of actions arising from the same accident is illustrated in cases such as *Curtis* v. *A. Garcia Y. Cia*, 272 F. 2d 235 (3rd Cir. 1959), where differing records in two trials produced a liability result for defendant and third-party defendant which it is quite pos-

[fol. 12] sible that neither fact finder would have reached if both actions had been considered at the same trial.

(4) Other reasons favoring transfer of the cases in the interest of justice.

In addition to the above factors favoring the transferee District as the only place where fair proceedings before trial and a fair trial for all parties on the issues of liability and culpability may be had, the following factors mentioned by the United States Supreme Court in *Gulf Oil Corp.* v. *Gilbert* (see second paragraph quoted in footnote 2, supra) favor trial in the transferee District:

(a) The litigation will be handled "at its origin," rather than in this court, the docket of which is more congested than that of the transferee District (see par. 7 of Wickenhaver Affidavit, being Exhibit B to Document No. 31).

(b) The trial of the issues of liability and culpability will be held "in a forum that is at home with the state law."

One of the principal arguments of the personal representative plaintiffs who oppose the transfer is that they will be deprived of the benefits of the public policy embodied in the Pennsylvania Constitution (particularly Article I, Section 11, and Article III, Section 21) if these cases are transferred. Cf. §612 of Restatement of Conflicts of Law. This argument against transfer is rejected for these reasons, among others:

A. There is no reason to believe that a Federal Judge, sitting in Massachusetts, will not be just as able in selecting and interpreting the applicable law as such a judge sitting in Pennsylvania will be.

The Supreme Court of the United States has recently stated: "The general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of [fol. 13] injury to the substantive rights of the parties."

Richards v. *United States*, 369 U.S. (1962).[13] In view of the possibility that the decision in the cases pending in the Pennsylvania State Courts referred to under B below may make moot the argument against application of the above-quoted rule in this case, it is not necessary to decide at this time such questions argued by counsel as the application to this situation of §§384, 391 (comment d), 412, 517 and 612 of the Restatement, Conflict of Laws, and as, when a case is transferred under 28 U.S.C.A. §1404(a), does the transferee court determine the rights of the parties on the basis of the law that would have been applied in the District where the suit was originally filed. See *Headrick* v. *Atchison, T.&S.F. Ry. Co.*, 182 F. 2d 305, 309-310 (10th Cir. 1950); *Gomez* v. *The SS. Dorothy*, 183 F. Supp. 499, 512 (D. Puerto Rico 1959); *Hargrove* v. *Louisville & Nashville Railroad Company*, 153 F. Supp. 681, 684 (W.D. Ky. 1957); *Greve* v. *Gibralter Enterprises*, 85 F. Supp. 410, 414 (D. New Mex. 1949);[14] and authorities cited in those cases. The transferee court will be better able to pass on these questions, if necessary, after decision of the cases pending in the Pennsylvania State Courts mentioned in footnote 20 below.

B. Contention that Pennsylvania public policy prevents enforcement of the measure of recovery but accepts the right of action provided in the Massachusetts Wrongful Death Act should not be ruled upon at this time.

Relying on (1) a recent dictum of four out of seven justices of the New York Court of Appeals in *Kilberg* v.

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[13] It is noted that in referring to the rule of some states "to take into account the interests of the State having significant contact with the parties to the litigation," the court did not refer to any Pennsylvania or Massachusetts cases in footnote 26 of its opinion (see page of 369 U.S.).

[14] In this case, the court used this language at page 414:

"It appears the rule should be that the legal rights of the parties are determined by the law of the state or district in which the cause originates. In other words, a change of venue affects the place of trial only."

Northeast Air Lines, Inc., 9 N.Y. 2d 34, 211 N.Y.S. 2d 133, [fol. 14] 172 N.E. 2d 526 (1961), to support the application of Article 3, §21, of the Pennsylvania Constitution,[15] (2) an older Pennsylvania Supreme Court case [*Passenger Railway Co.* v. *Boudreau*, 92 Pa. 475, 481-2 (1880)] to support the application of Article 1, §11, of the Pennsylvania Constitution[16] and (3) general language in Pennsylvania cases that foreign penal statutes will not be enforced in Pennsylvania courts,[17] the personal representative plaintiffs con-

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[15] Article 3, §21, provides:

"... in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."

Article 1, §18, of the New York Constitution, relied on in the *Kilberg case*, supra, provides: "The right of action now existing to recover damages for injuries resulting in death shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitations." It is noted that in view of the reasoning used to support the majority's dictum in the *Kilberg case*, the same result might not be applicable to defendants such as Lockheed and General Motors, which are not common carriers who sold tickets in the forum to domiciliaries or residents of the forum.

[16] Article 1, §11, of this Constitution provides:

"All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

[17] *Nesbitt* v. *Clark*, 272 Pa. 161 (1922); *Commercial Nat. Bank* v. *Kirk*, 222 Pa. 567 (1909). Although language in *Massachusetts Bonding Co.* v. *United States*, 352 U.S. 128, 132 (1956), is relied on to establish that the Massachusetts Wrongful Death Act is penal, the Pennsylvania appellate courts have recognized that the words "penal" and "penalty" have different shades of meaning. See *Commonwealth* v. *Musser Forests, Inc.*, 394 Pa. 205, 146 A. 2d 714 (1958); *Laughlin et al.* v. *Baltalden, Inc.*, 191 Pa. Super. 611, 617-8 (1960); cf. *Ward* v. *Rice*, 29 F. Supp. 714 (E.D. Pa. 1939). The Pennsylvania appellate courts have also recognized that there is a strong public policy in enforcing rights and duties validly created by foreign law. See *Personal Fin. Co.* v. *Gen. Fin. Co.*, 133 Pa. Super. 582, 585-6 (1938).

tend that they are entitled to recover compensatory damages without limit in these actions because of the alleged, strong Pennsylvania public policy opposed to the $20,000. limit in the Massachusetts Wrongful Death Act. Defendants argue that neither the Pennsylvania appellate court nor the Federal decisions have applied such a public policy to invalidate such foreign state limitations on recovery in the past. See, for example, *Slater* v. *Mexican National R.R. Co.*, 194 U.S. 120 (1904); *Kvecht* v. *United States*, 242 F. 2d 929 [fol. 15] (3rd Cir. 1957); *Rennekamp* v. *Blair*, 375 Pa. 620 (1954); cf: *Hughes* v. *Railroad Co.*, 202 Pa. 222, 228-9 (1902); and *Quaker Mills Corp.* v. *Howard Corp.*, 131 Pa. Super. 1, 8-9 (1938).[18] Also, defendants contend that the full faith and credit clause requires Pennsylvania courts to follow all the terms of the Massachusetts Wrongful Death Act, relying on *First Nat. Bank* v. *United Air Lines*, 342 U.S. 396, 400-401 (1952); *Order of Travelers* v. *Wolfe*, 331 U.S. 586 (1947); *Bradford Elec. Co.* v. *Clapper*, 286 U.S. 145, 160 (1932). Finally, defendants argue that if this Massachusetts Act may not be applied in these cases, there can be no recovery at all, since the plaintiffs have no remedy.

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[18] In the *Hughes case*, the court used this language at pp. 228-9:

"Where a contract containing a stipulation limiting liability for negligence, is made in one state, but with a view to its performance, by transportation through or into one or more other states, we see no reason why it should not be construed in accordance with the law of the state, where its negligent breach, causing injury occurs. If such a contract comes under construction, in a state like Pennsylvania whose policy prohibits such exemption, and the injury has occurred in a state where the contract is valid, the stipulation will be enforced, as in Forepaugh v. R.R. Co., and in Fairchild v. R.R. Co. But if the injury has taken place within its limits, it will declare the contract null and void, as in Burnett v. R.R. Co. In the Fairchild case, as the injury occurred in Maryland, this court enforced the law of that state; if the injury to the horse had been delayed until in the course of the journey, it had reached Pennsylvania, our own law of public policy would have controlled."

This approach seems different than the New York law, as exemplified in the *Conklin case*, relied on in the majority opinion in *Kilberg* at page 528 of 172 N.E. 2d.

However, in accordance with the repeated statements of the Supreme Court of the United States that District Courts should abstain from deciding issues involving the Constitution and public policy of a state so as to afford the state courts a reasonable opportunity to decide such matters,[19] [fol. 16] the determination of the law governing the measure of damages in these actions should be postponed until the trial on the issues of liability and culpability has been completed. Meanwhile, a Pennsylvania appellate court decision may become available to enlighten us on the public policy of this Commonwealth in this situation, since there are two cases pending in the state courts in which there will be an opportunity for the foregoing contention to be submitted to the Pennsylvania courts.[20]

Abstention of decision on this aspect of the case at this time will also prevent a premature decision on the Constitutional issue of the application of the full faith and credit clause.[21] Cf. *Railroad Comm'n. v. Pullman Co.*, 312 U.S. 496, 501 (1941).

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[19] See *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176-8 (1959); *Louisiana P. & L. Co.* v. *Thibodaux City*, 360 U.S. 25 (1959); and cases cited in Note, "Abstention: An Exercise in Federalism," 108 U. of Pa. Law Rev. 2226 (1959). In the *Thibodaux case*, the court said at page 27: "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law." In the *Harrison case*, the court said at page 176:

> "This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments . . . should at all times actuate the federal courts,' *Matthews v. Rodgers*, 284 U.S. 521, 525, as their 'contribution . . . in furthering the harmonious relation between state and federal authority . . . .'"

[20] It is noted that two actions previously pending in this court (C.A. Nos. 30390 and 30391) have been remanded to the state court and are now pending there (Court of Common Pleas No. 4 of Philadelphia County, Sept. Term 1961, No. 237, and Court of Common Pleas No. 6 of Philadelphia County, Sept. Term 1961, No. 238).

[21] Also, it is noted that the application of the Full Faith & Credit Clause to the dictum of the majority in the *Kilberg case*

Finally, it should be noted that the considerations stated in 28 U.S.C.A. §1404(a) require the transfer of the actions brought against the Government for these reasons, among others:

(a) The basis of the claims against the Government makes it only fair that it be permitted to bring in as a third-party defendant the Massachusetts Port Authority, as operator of the airport.

[fol. 17] (b) The District of Massachusetts is the only District where all the suits against the Government may be brought (see footnote 8 above);

(c) The Massachusetts Federal Court is most familiar with "the whole law of the State where the act or omission occurred" which must be applied in the suits against the Government, see *Richards* v. *United States*, supra, at page .; and

(d) There is no contention that the above-mentioned public policy contained in the Pennsylvania Constitution applies to these Government suits, which are not governed by the measure of damages in the Massachusetts Wrongful Death Act.

The many factors dictating transfer of the cases against the Government (19)[22] must be considered as a factor favoring transfer of the other cases pending in this District, so that

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is raised by an appeal now pending in the United States Court of Appeals for the Second Circuit from *Pearson, etc.* v. *Northeast Airlines, Inc.*, Civ. 147-142 in the U.S. District Court for the Southern District of New York, Opinion and Order filed 11/15/61. Counsel have informed the court that the New York District Court reached a contrary decision to *Pearson*, supra, in *Trauth* v. *Northeast Airlines, Inc.* (S.D.N.Y., C.A. 149-256, 1961), where a New Jersey citizen was plaintiff, on the ground that New Jersey's policy differed from that of New York. An excerpt from the transcript of the court's statements in *Trauth*, supra, is appended to the attached letter of 1/9/62 from counsel for General Motors.

[22] Civil Actions Nos. 28764, 28788, 28789, 29100, 29161, 29162, 29275, 29616, 29901, 30230, 30257, 30258, 30263, 30302, 30303, 30304, 30305, 30306 and 30343.

all cases arising from this accident may be treated uniformly by the court which must dispose of the great majority of such cases.

Plaintiffs in C.A. 30078, C.A. 30346 and C.A. 30284 contend that these wrongful death actions may not be transferred under 28 U.S.C.A. §1404(a) since they were not appointed as personal representatives in Massachusetts and, hence, could not have brought the actions there,[23] relying on *Hoffman* v. *Blaski*, 363 U.S. 335 (1960). However, the Supreme Judicial Court of Massachusetts has held that a foreign personal representative may bring a suit under the wrongful death act and later qualify in the forum,[24] even though the Statute of Limitations has run at the time of such later qualification,[25] in *Boudreau* v. *New England* [fol. 18] *Transportation Company*, 315 Mass. 423, 426-7, 53 N.E. 2d 921, where the court said:

> "Even apart from any admission under G.L. (Ter. Ed.) c. 231, §30, this is not a case where there was no plaintiff in existence when the action was brought. The plaintiff was a live person in whatever capacity she was acting or purporting to act. The question was whether she had the capacity to maintain the action. She could assert that she had and could bring the action and try the issue of her competency to maintain it. The action was therefore not a mere nullity but was from the first a genuine lawsuit and an adequate basis for an amendment alleging an appointment in the State of the forum when such appointment was secured."

Although this is a close question, this contention of plaintiffs is rejected for these reasons:

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[23] See *Boutillier* v. *Wesinger*, 322 Mass. 495, 496, 78 N.E. 2d 195 (1948).

[24] See Mass. Gen. Laws, Ch. 193, §§1 & 2, Ch. 194, §5, Ch. 195, §8, Mass. Ann. Laws, Ch. 204, §3.

[25] Cf. *Brennan* v. *Rooney*, 139 F. Supp. 484, 486-7 (E.D. Pa. 1956).

A. The District of Massachusetts is a District where Congress designated litigation of this type might be brought.

The appropriate Congressional Title of the United States Code (Title 28 covering "Judiciary and Judicial Procedure") provides in Chapter 85 (District Courts; Jurisdiction) at Section 1332(a) and in Chapter 87 (District Courts; Venue) at Sections 1391(a) and (c) and 1402(b) for institution of these actions in the District of Massachusetts.

In determining where a suit might have been brought, the dissenting opinion in *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, 116 (3rd Cir. 1951), which was quoted with approval in *Hoffman* v. *Blaski*, supra, at 343, states:

> "The district judge . . . had to decide whether the Northern District of Texas was a place where the suits 'might have been brought.' A reasonable and obvious way of determining this was to see whether Congress in some [fol. 19] other statute had designated the places where litigation of this sort might be brought.
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> . . . . . .
>
> "This background suggests that proper venue in more than one forum is the limiting context of the Code revision and that within this context Section 1404(a) substitutes a broad power of transfer for a more restricted pre-existing power of dismissal. Plaintiffs are prevented from abusing their normal privilege of choice among districts of proper venue. At the same time, courts are directed to respect the legislative enumeration of places which Congress has deemed appropriate for the trial of various types of litigation." (pp. 116 & 118).

B. A "common-sense approach" in interpreting Section 1404(a) of Title 28 to accomplish its purposes requires a construction that these cases "might have been brought" in the District of Massachusetts. See Continental Grain Co. v. Barge FBL-585, supra.

For the reasons stated above, it is "in the interest of justice" and "for the convenience of . . . witnesses" that

these actions be transferred to the District of Massachusetts. Under such circumstances, legal fictions such as the state which has authorized a personal representative to act should not be a basis for rejecting the use of 28 U.S.C.A. §1404(a). See *Continental Grain Co.* v. *Barge FBL-585*, supra, at 22-24. In distinguishing *Hoffman* v. *Blaski*, supra, the court said at page 22 of the *Barge FBL-585 case*:

> "Those cases involved transfers in which the plaintiffs filing the suits would have had no right whatever to proceed originally against the defendants on the 'civil actions' in the District Courts to which transfer was sought without the defendants' consent. But in this case there was admittedly a right on the part of the [fol. 20] grain company to subject the owner of the barge, with or without its consent, to a 'civil action' in Memphis at the time the New Orleans action was brought."

In applying 28 U.S.C.A. §1404(a), courts do not consider all the defenses which might have been, or be, raised in the transferee forum and decide whether an action might have been successfully brought there.[26] See *Greve* v. *Gibraltar Enterprises*, supra, at 412-3; cf. *Ackert* v. *Bryan*, F. 2d 30 L.W. 2310 (2nd Cir. 1962).

The defendants, by requesting these transfers, will be estopped from objecting to the capacity of the personal representative plaintiffs to proceed in these actions. See *Greve* v. *Gibralter Enterprises*, supra, at 414.[27]

Francis L. Van Dusen, J.

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[26] It is noted that "It is not necessary to aver the capacity of a party to sue or . . . the authority of a party to sue . . . in a representative capacity . . . " but such matters must be raised "by specific negative avertment. . . . ". See F.R. Civ. P. 9(a).

[27] There are attached to this opinion letters from counsel dated January 9, January 11, January 12 and February 14 with enclosures (including copy of letter of January 9, 1962, from the Clerk of the U.S. District Court for the District of Massachusetts, which was enclosed with the letter of January 11).

[fol. 21]

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions Nos. 28664, 28741, 28762, 28763, 28764, 28788, 28789, 29099, 29100, 29159, 29160, 29161, 29162, 29274, 29275, 29615, 29616, 29724, 29768, 29881, 29882, 29883, 29884, 29901, 30078, 30079, 30200, 30230, 30258, 30260, 30263, 30266, 30284, 30288, 30289, 30300, 30301, 30302, 30303, 30304, 30305, 30306, 30343, 30344 and 30346.

SIDNEY W. POPKIN,

v.

EASTERN AIR LINES, INC., and LOCKHEED AIRCRAFT CORP. and GENERAL MOTORS CORPORATION and succeeding cases captioned in the orders of 10/17/61 (Document No. 24 in C.A. 28664) and 11/1/61 (Document No. 7 in C.A. 29724), except Civil Actions Nos. 30257, 30259, 30307, 30390 and 30391 and all Admiralty Actions.

ORDER SUR MOTIONS TO TRANSFER—April 6 1962

(Documents Nos. 28, 29 & 30 in C.A. 28664; Nos. 30, 31 & 32 in C.A. 28741; Nos. 23, 24 & 25 in C.A. 28762; Nos. 26, 27 & 28 in C.A. 28763; Nos. 13 & 15 in C.A. 28764; Nos. 13 and 15 in C.A. 28788; Nos. 13 & 15 in C.A. 28789; Nos. 22, 23 & 24 in C.A. 29099; Nos. 12 & 14 in C.A. 29100; Nos. 22, 23 & 24 in C.A. 29159; Nos. 22, 23 & 24 in C.A. 29160; Nos. 11 & 13 in C.A. 29161; Nos. 11 & 13 in C.A. 29162; Nos. 22, 23 & 24 in C.A. 29274; Nos. 12 & 14 in C.A. 29275; Nos. 20, 21 & 22 in C.A. 29615; Nos. 9 & 11 in C.A. 29616; No. 9 in C.A. 29274; Nos. 15, 16 & 17 in C.A. 29768; Nos. 15, 16 & 17 in C.A. 29881; [fol. 22] Nos. 15, 16 & 17 in C.A. 29882; Nos. 15, 16 & 17 in C.A. 29883; Nos. 15, 16 & 17 in C.A. 29884; Nos. 8 & 11 in C.A. 29901; Nos. 21, 22 & 23 in C.A. 30078; Nos. 20, 21 & 22 in C.A. 30079; Nos. 11, 12 & 13 in C.A. 30200; No. 7 in C.A. 30230; No. 2 in C.A. 30258; Nos. 12, 13 & 14 in C.A. 30260; No. 2 in C.A. 30263; Nos. 9, 10 & 13 in C.A. 30266; Nos. 15, 16, 17 & 24 in C.A. 30284; No. 6 in C.A. 30288; No. 6 in C.A. 30289; Nos. 13, 14 & 15 in C.A. 30300; Nos. 13, 14 & 15 in C.A. 30301; No. 11 in C.A. 30302; No. 4 in C.A. 30303;

No. 2 in C.A. 30304; No. 11 in C.A. 30305; No. 2 in C.A. 30306; No. 12 in C.A. 30343; Nos. 13, 14 & 15 in C.A. 30344; Nos. 15, 16 & 17 in C.A. 30346)

And Now, April 6, 1962, It Is Ordered that the above-captioned cases are Transferred to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C.A. §1404(a).

Francis L. Van Dusen, J.

See Opinion filed earlier today.

[fol. 23] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
Civil Action No. 13994

BARRACK, Admx. of BARRACK; BROWNDORF, Admx. of BROWNDORF; GLICK, ARTHUR; GRANSDEN, Admr. of GRANSDEN; KING & BERKS COUNTY TRUST CO., Exects. of KING; MELTZER, Admx. of MELTZER; SCHWARTZ, Executrix of SCHWARTZ, M.; SCHWARTZ, Executrix of SCHWARTZ, T.; STALLER, Admx. of STALLER; WRIGHT, Admx. of WRIGHT,

—vs.—

HONORABLE FRANCIS L. VAN DUSEN, District Judge of the United States District Court for the Eastern District of Pennsylvania Ex Rel. EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORP., GENERAL MOTORS CORPORATION, and THE UNITED STATES OF AMERICA, Intervenors.

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION, OR BOTH —Filed April 6, 1962

To the Honorable, the Judges of the said Court:

The above captioned petitioners, by their attorneys, Richter, Levy, Lord, Toll & Cavanaugh, respectfully represent:

1. That they are residents and citizens of the Eastern District of Pennsylvania.

[fol. 24] 2. That on October 4, 1960, an airplane owned and operated by Eastern Air Lines, Inc., crashed into the waters of Boston Harbor upon take-off from Logan Airport in Boston, Massachusetts.

3. That petitioner, Arthur Glick was a passenger in said airplane at the time of said crash and that he sustained personal injuries as a result thereof.

4. That the other petitioners are the duly appointed personal representatives of Pennsylvania domiciliaries who were passengers on said airplane and whose deaths were the result of said crash.

5. That the said airplane at the time of said crash was en route to Philadelphia, Pennsylvania.

6. That actions to recover damages for said personal injuries and deaths were instituted by petitioners in the United States District Court for the Eastern District of Pennsylvania against Eastern Air Lines, Inc., Lockheed Aircraft Corp., and General Motors Corporation, said actions being Civil Actions Nos. 29274, 29099, 28741, 28763, 29615, 28762, 29160, 29159, 30266, 30200, and against the United States of America, said actions being Civil Action Nos. 29275, 29100, 28764, 28789, 29616, 28788, 29162, 29161, 30263 and 30230.

7. That each of the parties sued is doing business in and is subject to service in the Eastern District of Pennsylvania and has been duly served.

[fol. 25] 8. That each of the parties sued moved for transfer of said actions to the United States District Court for the District of Massachusetts under 28 U.S.C.A., Section 1404 (a).

9. That said motions were opposed by petitioners.

10. That said motions were the subject of a hearing before the Honorable Francis L. Van Dusen, Judge of the United States District Court for the Eastern District of Pennsylvania, on December 15, 1961, and that order and

opinion has been filed on this date, April 6, 1962 a copy of which is attached hereto as Exhibit "A", granting the motions to transfer.

11. That a Massachusetts Punitive Statute limits recovery in wrongful death actions to between $2,000 and $20,000, to be assessed with reference to the degree of culpability of the defendant.

12. That when plaintiff and plaintiff's decedent are domiciliaries of Pennsylvania the Constitution and public policy of Pennsylvania preclude the Pennsylvania courts and, under *Erie* v. *Tompkins*, the federal courts sitting in Pennsylvania from giving effect to the punitive limitation on the recovery of damages in wrongful death actions contained in said Massachusetts statute, and require that the Pennsylvania rule of compensatory damages be applied.

13. That the transferee court, the United States District Court for the District of Massachusetts, may not give effect to or accord petitioners the benefit of the Constitution and public policy of Pennsylvania and may apply said Massachusetts Punitive Statute limiting recovery in wrongful death actions to the prejudice and irreparable harm of petitioners.

[fol. 26] 14. That Pennsylvania law and Pennsylvania public policy favoring the protection of Pennsylvania domiciliaries would follow the decision of the New York Court of Appeals in *Kilberg* v. *Northeast Air Lines, Inc.*, 9 N. Y. 2d 34, 211 N. Y. S. 2d 133, 172 N. E. 2d 56 (1961) in which suit was brought in New York by a New York domiciliary for the wrongful death of a New York domiciliary in a Massachusetts airplane crash and in which the New York Court of Appeals held that the liability and damage provisions of the Massachusetts Statute were severable and that the application of the punitive restriction of the Massachusetts Statute was violative of New York public policy and that therefore unrestricted compensatory damages rather than the nominal punitive limitation imposed by Massachusetts law would govern.

15. That by reference to Pennsylvania law and Pennsylvania public policy the District Court in which the

within actions were filed would be bound to apply the rule of the *Kilberg* case, whereas upon transfer of the within causes to the District Court sitting in Massachusetts, the transferee court would not be so bound but on the contrary would likely ignore Pennsylvania law and Pennsylvania public policy and substitute instead the restrictive punitive provisions of the Massachusetts Statute.

16. That the transfer of said cases may thus deprive the petitioners, the survivors and next of kin of the decedents they represent, Pennsylvania domiciliaries all, of fundamental and substantial rights guaranteed them by the Pennsylvania Constitution and will violate the strong public policy of the Commonwealth of Pennsylvania which affords protection to its domiciliaries.

[fol. 27] 17. That transfer of the within causes of action to the Federal Court in Massachusetts constitutes a violation of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States in that it permits a non-resident defendant to engage in forum shopping not in fact for the convenience of parties or witnesses but for the purpose of obtaining a different rule of substantive law applicable to the measure of damages in the within causes of action.

18. That the order of transfer of the learned Judge below constitutes an abuse of discretion in that the public policy favoring the protection of petitioners as Pennsylvania domiciliaries under the substantive compensatory damage provisions of Pennsylvania vis-a-vis the restrictive punitive provisions of Massachusetts constitutes a consideration of such magnitude as to far outweigh any policy in the instant cases which would favor transfer as a matter of convenience for some of defendants' witnesses.

19. That the order of transfer constitutes an abuse of discretion in that and to the extent that the learned Judge below based his order of transfer on the conclusion that the proposed transferee district is "the only place where fair proceedings before trial and a fair trial for all parties on the issues of liability and culpability may be had. . . ." (Opinion of Hon. Francis L. Van Dusen, District Judge, filed April 6, 1962, page 13)

20. That petitioners know of no reason whatsoever why fair proceedings before trial and a fair trial for all parties may not be had in the United States District Court for the [fol. 28] Eastern District of Pennsylvania and with much greater likelihood that Pennsylvania's law and public policy as to compensatory damages and non-recognition of punitive statutes will be applied than if the causes are tried in a Federal Court sitting in Massachusetts.

21. That the private interest of the petitioner litigants, the interests of justice and convenience of witnesses and parties all balance overwhelmingly in favor of non-transfer.

22. That the order of transfer of the learned Judge below involves the transfer of cases to a transferee district whose applicable rule as to damages is violative of the law and public policy of the transferor forum.

23. That the transfer of said cases will cause extreme hardship to the petitioners, most of whom are widows with minor children, who will be forced thereby to move to Boston for an extended and indefinite period of time, and to bring with them, and compensate for their time and trouble, their witnesses, almost all of whom, particularly on the issue of damages, are Pennsylvania residents, and many of whom may decline to attend at Boston.

24. That the matters herein involved were fully briefed and argued before the learned Judge below and that petition for reargument with a view toward obtaining reversal of the order of transfer would be a futile and useless act.

25. That if said transfer is not restrained immediately, [fol. 29] said transfer may take place and this petition become moot, thus denying petitioners appellate review of the order to transfer.

Wherefore, petitioners by their attorneys, Richter, Levy, Lord, Toll & Cavanaugh, move the Court to issue forthwith an order temporarily restraining the Clerk of the District Court of the Eastern District of Pennsylvania from transferring said cases to the District of Massachusetts, and to grant a rule on the respondent, Hon. Francis L. Van Dusen, to show cause why a writ of man-

damus or prohibition, or both, should not issue prohibiting the transfer of said cases to the District of Massachusetts.

Respectfully submitted,

Richter, Levy, Lord, Toll & Cavanaugh, By: Elwood S. Levy, Counsel for Petitioners.

[fol. 30] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 13997

SIDNEY W. POPKIN; MARY B. GRICE, Executrix of the Estate of DAVID S. GRICE, Deceased; DOROTHY WEINSTEIN, Executrix of the Estate of RALPH WEINSTEIN, Deceased; DIANE BRAFF, Administratrix ad Prosequendum and as General Administratrix of the Estate of BERNARD JAY BRAFF, Deceased; EMANUEL WEINSTEIN, Administrator of the Estate of HILDA LONDON, Deceased; RONALD LONDON, Administrator c.t.a. of the Estate of PHILIP LONDON, Deceased; ATTILIO E. ABATE, Administrator of the Estate of FREDERICK N. ABATE, Deceased; THELMA P. FREEMAN and PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Co-Executors of the Estate of ADDISON B. FREEMAN, JR., Deceased; EDNA E. LONG and LAURA MANNEY, Administratrices of the Estate of SHIRLEY E. REITZ, Deceased, Petitioners,

v.

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, Respondent.

PETITION FOR WRIT OF MANDAMUS, PROHIBITION OR BOTH —Filed April 11, 1962

To the Honorable, the Judges of the Said Court:

Come now the petitioners in the above-captioned causes by their attorneys, Messrs. Freedman, Landy and Lorry,

filing this petition for Writ of Mandamus, Prohibition or Both against The Honorable Francis L. Van Dusen, District Judge for the Eastern District of Pennsylvania, and respectfully represent:

1. This petition is filed pursuant to 28 U.S.C., Sec. 1651.

2. The above-captioned causes of action arise from the crash of an airplane into the navigable waters of Boston Harbor in Massachusetts on October 4, 1960.

[fol. 31] 3. All of the defendants and/or respondents are doing business or have agreed to acceptance of service of process within the Eastern District of Pennsylvania and have been duly served.

4. Each of the defendants and/or respondents have moved for transfer to Massachusetts pursuant to 28 U.S.C., Sec. 1404(a).

5. Each of the plaintiffs and/or libellants have opposed the aforesaid motion for transfer.

6. On December 15, 1961, a hearing was held before Judge Van Dusen whereby arguments were propounded on both sides regarding the aforesaid motion to transfer.

7. By an opinion and order entered April 6, 1962, a copy of which is annexed hereto as Exhibit A, Judge Van Dusen granted the motion to transfer to the District Court sitting in Massachusetts.

8. The Massachusetts Wrongful Death Statute (Ann. Laws of Mass., Ch. 229, Sec. 3(a)) limits the amount of recovery for wrongful death to $20,000 and assesses liability on the degree of culpability.

9. The above plaintiffs and/or libellants are the personal representatives of decedents, who were Pennsylvania domiciliaries, except for one plaintiff who was a passenger of the plane and survived the crash, who is also a Pennsylvania domiciliary.*

* Except for the Abate case, Civil Action No. 30300 and 30307 and No. 335 of 1961 In Adm., wherein the personal representative

10. The constitution and public policy of Pennsylvania preclude a Pennsylvania court and/or a federal court sitting in Pennsylvania by diversity of citizenship jurisdiction from applying the aforementioned Massachusetts limitation on recovery to Pennsylvania domiciliaries, especially [fol. 32] when the contract of transportation was entered into in Pennsylvania, the beneficiaries of any recovery are Pennsylvania domiciliaries and the flight during which the tragedy occurred was returning to Pennsylvania.

11. It is highly probable that a federal court sitting in Massachusetts will not give effect to the aforementioned Pennsylvania policy as enunciated in its constitution and the decisions of its courts.

12. It is also highly probable that should the federal court sitting in Massachusetts seek to give effect to the aforementioned Pennsylvania public policy, that a jury of Massachusetts citizens dealing with a highly unfamiliar method of assessing damages and forced to apply dissimilar standards as between the Pennsylvania and the Massachusetts residents who were also passengers on the ill-fated flight would not award fair and just amounts to the personal representatives of the deceased Pennsylvania passengers in accordance with the Pennsylvania rules.

13. Petitioners submit that the Pennsylvania law and public policy as enunciated by the courts, legislature and Constitution of the Commonwealth of Pennsylvania (Art. III, Sec. 21) would follow the case of *Kilberg* v. *Northeast Airlines*, 9 N.Y. 2d 34, 172 N.E. 2d 526 (N.Y. Court of Appeals, 1961), in denying the application of the restriction on recovery contained in the aforementioned Massachusetts Wrongful Death Statute.

14. By having these cases remain within the Eastern District of Pennsylvania petitioners are afforded an opportunity to have presented in sharpest focus to judges most familiar with the aforementioned Pennsylvania law

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of the decedent is a Massachusetts resident, as was the decedent, and the Braff case, Civil Action No. 29884 and 30304 and No. 327 of 1961 In Adm., in which the personal representative of the decedent is a New Jersey resident, as was the decedent.

and public policy the need and desirability of the application of the *Kilberg* doctrine thereto.

15. Petitioner respectfully submits that Judge Van Dusen abused his discretion under Sec. 28 U.S.C. 1404(a) [fol. 33] in failing to consider all of the elements enunciated in that statute and by the Supreme Court in *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501 (1946), and *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955), in the following regards:

(a) He failed to properly weigh the importance of the Pennsylvania public policy regarding the compensatory nature of damages in that he erroneously assigned it only importance equal to the inconvenience that might be suffered to some of the defendants' witnesses.

(b) He failed to take cognizance of the fact that the eyewitnesses to the crash, most of whom reside in and about Boston, Massachusetts, are not important witnesses inasmuch as the controversy on the merits will revolve about the cause of the crash and not as to the fact of the crash itself.

(c) He failed to take cognizance of the fact that in weighing the relative convenience as between plaintiffs and/or libellants and defendants and/or respondents, the defendants and/or respondents, in view of the multi-state scope and nature of their activities, must be held to have contemplated being subject to suit in more than one jurisdiction.

(d) He failed to take cognizance of the fact that the transportation and/or availability of witnesses presents no real problem to the defendants and/or respondents while it represents enormous hardship to the plaintiffs and/or libellants.

[fol. 34] (e) He overemphasized, and in fact gave controlling weight, to the fact that consolidation of all the cases against all of the defendants and/or respondents could take place only in Massachusetts, while failing to take cognizance of the fact that it is universally agreed that consolidation should be denied

where the rights of the parties cannot be adequately protected thereby.

(f) He stated in his opinion (p. 13) that Massachusetts is the only place where a "fair trial" could take place, which the petitioners respectfully submit demonstrates that he did not adequately consider the fairness or unfairness as to the plaintiffs and/or libellants of a trial in Massachusetts.

(g) He failed to take cognizance and/or to assign proper weight to the fact that the Supreme Court has specifically stated that the claimant's selection of forum, when not chosen arbitrarily or for purposes of harassment, puts a "burden" upon the movant for transfer to justify the granting of his motion.

(h) He failed to take cognizance and/or to assign proper weight to the line of cases which held that in aviation disaster cases the courts have denied transfer and avoided consolidation where it would work severe hardship upon the claimants.

(i) As to the petitioner Sidney Popkin, who is a survivor of the crash, he failed to take cognizance of [fol. 35] the extra hardship that would be imposed, due to the fact that his witnesses concerning the extent of his damages and medical expenses, are all Pennsylvania residents.

16. All of these matters have previously been presented to the Court via argument and brief so that reargument would be futile.

17. The order granting transfer is not otherwise appealable.

18. Petitioners respectfully submit that immediate restraint is necessary so as to avoid transfer, and further to avoid having this petition become moot.

Wherefore, petitioners respectfully move this Honorable Court to issue a restraining order and to grant a rule on the respondent, The Honorable Francis L. Van Dusen, to show cause why a writ of mandamus, prohibition or both

should not issue prohibiting transfer of the above-captioned causes.

Freedman, Landy and Lorry, By: Milton M. Borowsky, Attorneys for Petitioners.

[fol. 36] *Duly sworn to by Milton M. Borowsky, jurat omitted in printing.*

[fol. 37] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14,003

HOWARD H. RAPP, Administrator of the Estate of RICHARD F. ZELLER, Dec'd., DONALD A. SCOTT, Administrator of the Estate of THOMAS L. MOODY, Dec'd., and NANCY A. FRANKENFIELD, Administratrix of the Estate of GEORGE B. FRANKENFIELD, JR., Dec'd, Petitioners,

vs.

THE HONORABLE FRANCIS L. VAN DUSEN, Respondent.

PETITION FOR TEMPORARY STAY OF PROCEEDINGS AND WRIT OF MANDAMUS—Filed April 14, 1962

[fol. 38] To The Honorable Judges of Said Court:

Your petitioners respectfully ask this Honorable Court to issue Temporary Restraining Order and Writ of Mandamus in the form and for the reasons set forth below.

1. *Identity of Petitioners.*

Petitioners are Howard H. Rapp, Administrator of the Estate of Richard F. Zeller, Dec'd.; Donald A. Scott, Administrator of the Estate of Thomas L. Moody, Dec'd.; and Nancy A. Frankenfield, Administratrix of the Estate of George B. Frankenfield, Jr., Dec'd., each of whom is a

citizen of Pennsylvania and a resident of the Eastern District of this Commonwealth and each of whom has brought wrongful death and survival actions in the United States District Court for the Eastern District of Pennsylvania against Eastern Air Lines, Inc., Lockheed Aircraft Corp., General Motors Corporation and The United States of America, numbered respectively Civil Actions 30,078, 30,346 and 30,284.

2. *Relief Sought In This Court.*

Each Petitioner respectfully asks this Honorable Court (1) to issue an order directing a stay of all proceedings in each of the above numbered cases pending final disposition of this petition and (2) to issue a writ of mandamus directed to The Honorable Francis L. Van Dusen, Judge, directing said Respondent to vacate his Order Sur Motions to Transfer dated April 6, 1962, heretofore entered in each of said actions, transferring said actions to the United States District Court for the District of Massachusetts.

[fol. 39] 3. *The Grounds For This Petition.*

Petitioners respectfully assert that the entry of said order of transfer was contrary to law and therefore void for the reason that, as is more fully set forth below, said order was in contravention of §1404(a) of the Judicial Code which permits transfer of such an action only "to any other district . . . where it might have been brought", (28 U.S.C.A. §1404(a)) whereas the subject actions could not have been brought in Massachusetts.

4. *Summary Of The Factual Background Of This Petition.*

Each petitioner is a citizen of Pennsylvania and a resident of the Eastern District of said estate.

Each decedent died in the crash of an airplane in Boston, Massachusetts, on October 4, 1960, for which death each action is brought.

Each decedent died a resident of Pennsylvania with all of his assets located in this state.

Each petitioner is a fiduciary duly appointed by a Register of Wills of Pennsylvania. No petitioner has been appointed or licensed by any officer or agency of Massachusetts.

With the exception of actions in the Courts of Common Pleas of Philadelphia, since discontinued without prejudice by agreement, no petitioner has brought an action with respect to his decedent in any court other than the United States District Court for the Eastern District of Pennsylvania.

In the court below, defendants moved to transfer each case to the United States District Court for the District of Massachusetts and after argument Respondent granted said motions and entered the order above described.

[fol. 40] 5. *Why These Actions Could Not Have Been Brought In Massachusetts.*

(a) Under Massachusetts law an action for wrongful death must be brought within one year (Mass. Ann. Laws, ch. 229, §2) and may be brought only by the deceedent's executor or administrator (Mass. Ann. Laws, ch. 229, §2).

(b) Under Massachusetts law, an administrator appointed in another jurisdiction does not have the right to bring an action under the Massachusetts death statute. *Boutillier* v. *Wesinger*, 322 Mass. 495, 78 N.E. 2nd 195 (1948).

(c) In order to have the right to bring an action in Massachusetts, each of these fiduciaries would have had to petition the Probate Court of Massachusetts for a license to do so, making the commissioner of corporations and taxation a party to said petition and giving him 14 days' notice thereof (Mass. Ann. Laws, ch. 204, §3). The Probate Court might or might not eventually have seen fit to grant said petitions. Cf. *Morgan* v. *Morgan*, 267 Mass. 388, 166 N.E. 747 (1929).

In two of the instant actions, namely, the *Frankenfield* case, C. A. No. 30,284, and the *Scott* case, C. A. No. 30,346, the actions were commenced in this district less than 14 days before the expiration of one year from the date of death, and therefore not only was it impossible for these actions

to have been brought in Massachusetts on that date but it was also by then impossible for the plaintiffs to have obtained the necessary license even had they been obliged to try to do so.

[fol. 41] (d) The capacity of a representative plaintiff to sue in the United States District Court is to be determined by the law of the state in which the District Court is held. F.R.C.P. 17(b).

(e) In a recent removal case the Supreme Court of the United States affirmed the issuance of a writ of mandamus vacating an order for transfer, squarely upon the ground that a case cannot be transferred to another district unless that district be one in which the plaintiffs had the *right* (emphasis by the Supreme Court) to bring the action with or without consent of, or waiver of objection by, the defendants. *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

(f) The learned and respected Respondent, in describing this issue at page 21 of this opinion of April 6, 1962, as "a close question", ordered transfer in partial reliance upon *Boudreau* v. *New England Transportation Company*, 315 Mass. 423, 53 N.E. 2d 921 (1944), which is clearly distinguishable from the instant cases in that there the defendant did not make a timely objection to the foreign fiduciary's lack of capacity to sue. But it is that very point which is squarely decided in favor of your petitioners' position by *Hoffman* v. *Blaski*, *supra*, which holds that the mere fact that defendants will waive their otherwise valid objections to the action does not meet the requirements of §1404(a) that the transferee jurisdiction be one in which the plaintiffs have the *right* to sue.

[fol. 42] (g) The learned Respondent also relied in part upon the case of *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960), but that case also is not a valid guide in these proceedings inasmuch as the same parties to the transfer under §1404(a) in that case were already in litigation upon the same issues in the transferee district.

6. Copies of this petition have been served upon Respondent and counsel for each of the defendants in the proceedings below.

Wherefore Petitioners respectfully pray the issuance of the above order and writ.

Respectfully submitted,

Ralph Earle II, John R. McConnell, Attorneys for Petitioners.

Of Counsel: Morgan, Lewis & Bockius, 2107 Fidelity-Philadelphia Trust Building, Philadelphia 9, Pennsylvania.

[fol. 43] *Duly sworn to by John R. McConnell, jurat omitted in printing.*

[fol. 44] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14011

LEAH BIERNBAUM and DEWEY HOFFMAN Executors of the Estate of LEONARD BIERNBAUM, Petitioners,

v.

THE HONORABLE FRANCIS L. VAN DUSEN, Respondent.

PETITION FOR RULE TO SHOW CAUSE WHY A WRIT OF MANDAMUS SHOULD NOT ISSUE—Filed April 18, 1962

Krusen Evans and Byrne, 21 South 12th Street, Philadelphia 7, Penna., Attorneys for Petitioners.

[fol. 45] To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

The petitioners herein are Leah Biernbaum and Dewey Hoffman, Executors of the Estate of Leonard Biernbaum, having been so appointed by the Register of Wills of Montgomery County, Pennsylvania. Both petitioners are citizens and residents of the Commonwealth of Pennsylvania, and the decedent for whose estate they are executors was a

citizen and resident of the Commonwealth of Pennsylvania prior to and at the time of his death. The petitioners brought an action for wrongful death under Pennsylvania's Survival Act statute in the United States District Court for the Eastern District of Pennsylvania against Eastern Air Lines, Inc., Lockheed Aircraft Corporation and General Motors Corporation which action was docketed in that Court as Civil Action No. 29768.

The plaintiffs' decedent was a passenger on an aircraft operated by one of the defendants as a common carrier which plane crashed near Logan International Airport, Boston, Massachusetts, on October 4, 1960.

After issue was joined, the defendants filed motions to transfer under 28 U.S.C.A. §1404(a), and on April 6, 1962, the Honorable Francis L. Van Dusen filed an opinion and thereafter entered an order transferring this and fifty-[fol. 46] four other cases from the United States District Court for the Eastern District of Pennsylvania to the United States District Court for the District of Massachusetts.

Thereafter, the Honorable Francis L. Van Dusen, on April 16, 1962, amended the Order of Court dated April 6, 1962, the effect of which amendment was to stay the transfer pending action by this Court.

The Relief Sought

The petitioners respectfully pray that this Honorable Court shall issue a rule upon the respondent, the Honorable Francis L. Van Dusen, directing that cause be shown why his order of April 6, 1962, directing transfer of the actions, should not be vacated. The effect of vacating the order to transfer would be to permit prosecution of this action in the United States District Court for the Eastern District of Pennsylvania rather than in the United States District Court for the District of Massachusetts.

Reasons Why the Petition Should Be Granted

As already appears, the petitioners have been appointed by the Register of Wills of Montgomery County of Pennsylvania and neither petitioner has been appointed or quali-

[fol. 47] fied as a fiduciary under the law of Massachusetts. The petitioners do not have the right to prosecute this action in Massachusetts under the laws of that Commonwealth. In order to have prosecuted any action in Massachusetts arising out of the death of the petitioners' decedent, the petitioners would have had to qualify before the probate court of Massachusetts and obtain ancillary appointment in that state. In any proceedings before the probate court of Massachusetts the Commissioner of Corporations and Taxations of that Commonwealth would have to be a party and notice served upon him pursuant to *Mass. Annotated Laws,* Chapter 204 §3.

The grant by the probate court of Massachusetts of the right to prosecute an action pursuant to the laws of that Commonwealth [*Mass. Annotated Laws,* Chapter 229 §2] is not a mere ministerial act, and the capacity of a person or persons, so situated as are the petitioners herein, must be determined pursuant to Federal Rule of Civil Procedure 17(b) by the law of the state in which the Federal District Court sits, in this case, Massachusetts. Therefore, the petitioners did not have the right to bring an action in a state or federal court in Massachusetts under the laws of that Commonwealth. Therefore, the provisions of 28 U.S. C.A. §1404(a) have not been met in the instant action for the reasons that the present plaintiffs in their present [fol. 48] respective capacity could not have brought an action in the District Court for the District of Massachusetts, the prospective transferee forum. Under 28 U.S.C.A. §1404 (a) an action may be transferred to another District if—and only if—the same action by the same plaintiffs could have been brought as a matter of right in the proposed transferee District.

Under *Massachusetts General Laws,* Chapter 231 §30, the defendants in the court below, had they been sued by the plaintiffs herein in Massachusetts, could have filed within ten days, or such further time as the court might allow, "a special demand" attacking the right of the plaintiffs herein to proceed in Massachusetts. This was recognized in the court below by the defendant, Lockheed Aircraft Corporation, for it there argued:

"It is clear that each of the instant administrators could have brought and maintained these actions in Massachusetts *unless the defendants made the demand contemplated by the statute.*" *Boutiller* v. *Wesinger*, 322 Mass. 495. [Emphasis Supplied]

[See P. 3, Supplemental brief for defendant Lockheed Aircraft Corporation in support of motion to transfer, filed in the District Court.]

Supreme Court decisions construing 28 U.S.C.A. §1404 (a), such as *Hoffman* v. *Blaski*, 363 U.S. 334, make it clear [fol. 49] that a prospective transferee district must be one in which the plaintiffs had the absolute *right* to maintain the action, with or without waiver of any rights the defendant might have had to make, or refrain from making, the demand contemplated by the Massachusetts statute.

It is clear from the Massachusetts statutes and decisions that the present plaintiffs might not, without further qualification and appointment as ancillary executors in Massachusetts, have maintained actions against the parties who were the defendants in the court below. The fact that the same two persons might [or might not] have been accepted in Massachusetts as qualified to bring an action and/or that the defendants might have waived their right to question the capacity of the petitioners as plaintiffs in an action in Massachusetts is demonstrative of the fact that there is serious question as to the correctness of the legal conclusions of the learned District Judge. Substantial rights of the petitioners and a large number of other persons, and substantial additional expense depleting the rights of the Estate or perhaps defeating such altogether, turn upon the question of transfer.

It is respectfully submitted that there are substantial legal questions involved; that appeal from the final judgment is not a sufficient and adequate remedy, and that petitioners' only remedy is by mandamus.

[fol. 50] Wherefore, the petitioners respectfully pray that this Honorable Court may issue a rule to show cause to the Honorable Francis L. Van Dusen, District Judge of the United States District Court for the Eastern District of Pennsylvania, directing that cause be shown why the order

of April 6th heretofore referred to should not be vacated and set aside.

Respectfully submitted,

Krusen Evans and Byrne, By T. E. Byrne, Jr., Attorneys for Petitioners.

[fol. 51] *Duly sworn to by T. E. Byrne, Jr., jurat omitted in printing.*

[fol. 52] [File endorsement omitted]

IN THE UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 14033

DORIS A. LAISTER, as Executrix of the Estate of CHESTER H. LAISTER, Deceased, SELMA BIRENBAUM, ABE BIRENBAUM and ABRAM P. PIWOSKY, as Executors of the Estate of MARTIN BIRENBAUM, Deceased, and SYLVIA BARRACK, as the widow of MORRIS BARRACK, Deceased, and the First Pennsylvania Banking & Trust Company, as Executor of the Estate of MORRIS BARRACK, Deceased, Petitioners,

vs.

THE HONORABLE FRANCIS L. VAN DUSEN, Respondent.

PETITION FOR WRIT OF MANDAMUS OR PROHIBITION AND FOR TEMPORARY STAY OF PROCEEDINGS—Filed May 4, 1962

Abram P. Piwosky, Attorney for Plaintiffs Birenbaum & Sylvia Barrack, 1010 Lumberman's Bldg., Philadelphia 7, Pennsylvania.

[fol. 53] David M. Hass, Attorney for Plaintiff Doris A. Laister, 1530 Chestnut Street, Philadelphia 2, Pennsylvania.

Of counsel: Lee S. Kreindler, Kreindler & Kreindler, 51 Chambers Street, New York 7, New York.

[fol. 54] To the Honorable Judges of Said Court:

Your Petitioners respectfully ask this Honorable Court to issue a writ of mandamus or prohibition and to issue a temporary restraining order in the form and for the reasons set forth below.

I. *Identity of Petitioners.*

Petitioners are the personal representatives of three decedents killed in the crash of an Eastern Air Lines Electra aircraft in Boston, Massachusetts, on October 4, 1960. Each of them has brought an action for wrongful death against the sole defendant, Eastern Air Lines, Inc., in the United States District Court for the Eastern District of Pennsylvania. The actions are respectively numbered Civil Action Numbers 29724, 30288, and 30289. Each of the decedents was a citizen and resident of Pennsylvania, and each of the Petitioners is a citizen of Pennsylvania, except for Doris A. Laister, who was a citizen of Pennsylvania at the time the said action was started, but who has since moved to the State of Florida.

II. *Relief Sought in this Court.*

Each Petitioner respectfully asks this Honorable Court (1) to issue a writ of mandamus or prohibition directed to [fol. 55] the Honorable Francis L. Van Dusen, Judge, directing said Respondent to amend his order sur motions to transfer dated April 6, 1962, at least with respect to the actions brought by these petitioners, as requested in the Petitioners' motion to amend said order (which motion was denied by the said Judge Van Dusen on April 27, 1962), or, in the alternative, directing said Respondent to vacate said order of transfer; and (2) to issue an order directing a stay of all proceedings in each of the above numbered cases pending a final disposition of this Petition, and if this Petition is denied, pending a disposition of a Petition for a writ of certiorari to the United States Supreme Court.

III. *The Order of Transfer Dated April 6, 1962.*

In an Order dated April 6, 1962 the Respondent, the Honorable Francis L. Van Dusen, Judge, directed that the

said three actions, along with many other actions arising out of the same airplane crash, be transferred to the United States District Court for the District of Massachusetts.

IV. *The Petitioners' Motion to Amend Said Order of Transfer.*

The Petitioners thereafter moved, in the United States District Court for the Eastern District of Pennsylvania, before said Respondent to have the said Order of Transfer amended, by adding to said Order either or both of the following provisions:

[fol. 56] (1) That this order of transfer is conditioned upon the consent by the defendant, Eastern Airlines, Inc., to the application of Pennsylvania public policy refusing to enforce any limitation of damages for wrongful death, if such a public policy has been enunciated by a Pennsylvania State Court prior to the termination of this litigation.

(2) It Is Also Ordered that damages in these cases be awarded without limitation and consistent with Pennsylvania public policy to that effect, if said public policy has been enunciated by a Pennsylvania State Court prior to a termination of this litigation.

V. *Reasons for the Motion to Amend.*

(a) Without such an amendment (or such amendments) there is a serious question of law as to whether the transferee court (the District Court of Massachusetts) would have the power to enforce Pennsylvania public policy if such becomes appropriate.

(b) The first suggested amendment would enable the District Court in Massachusetts to enforce Pennsylvania public policy (if such becomes appropriate by virtue of the Pennsylvania State Court following the *Kilberg* doctrine) since that Court would have the power to enforce what would be, in effect, a stipulation of the parties, and since the defendant, Eastern Air Lines, Inc., would be estopped from resisting the application of said Pennsylvania public policy.

(c) The second proposed amendment would have the effect of giving the District Court of Massachusetts the [fol. 57] power to enforce Pennsylvania public policy (again, if such becomes appropriate), since it would establish the law of the case which the transferee court would have the power to follow.

(d) The Supreme Court of the United States has never decided the difficult question of whether the transferee court follows the law of the state of the forum or the law of the transferor state.

(e) In the absence of such a determination by the Supreme Court of the United States the question is in doubt and the Petitioners' rights are in jeopardy.

(f) Without such protective amendments the Petitioners in these actions may find themselves denied the benefits of Pennsylvania public policy. This would be a denial of both equal protection of the laws and due process of law, since other plaintiffs (in Pennsylvania State Courts) similarly situated would have the benefit of Pennsylvania policy, while these plaintiffs would not.

VI. *Pennsylvania's public policy will be pronounced by the Pennsylvania State Court.*

In the case of *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 211 N.Y.S. 2d 133, 172 N.E. 2d 526 (1961) the highest court of the State of New York (The Court of Appeals) held that the Massachusetts limitation of damages for wrongful death was contrary to New York's public policy, [fol. 58] and would not be enforced, although the right of action for wrongful death created by Massachusetts law would be enforced by New York courts.

In the actions commenced by the Petitioners herein, in the United States District Court for the Eastern District of Pennsylvania, the assertion is made that Pennsylvania's public policy is the same as New York public policy, as expressed in *Kilberg*.

In two other actions arising out of the same Eastern Air Lines' Boston accident (both entitled Shackton v. Eastern Air Lines, Inc.,) brought and currently pending in the

Pennsylvania State Court (The Court of Common Pleas) the same question of Pennsylvania public policy has been raised.

The possibility that the Pennsylvania State Courts, in the Shackton cases, or in other cases raising the same question, will decide that Pennsylvania public policy is the same as New York's public policy, expressed in *Kilberg* is expressly recognized in the opinion of the Respondent, in the District Court, below, on transfer (pages 18-19 of the Opinion).

VII. *The Power of the Transferee Court to Enforce Pennsylvania public policy is in doubt.*

The serious difficulty presented by Respondent's order of transfer, as it now stands, lies in the possibility that the transferee court may not have the *power* to apply Pennsylvania public policy once the case has been transferred *unless* Respondent has made such application of Pennsyl- [fol. 59] vania public policy the law of the case, or unless the defendant below, Eastern Air Lines, Inc., has consented to such application.

There is a serious question as to whether or not the transferee court must apply the law (and particularly the public policy) of the state in which *it* sits or the law (including the public policy) of the transferor state. Since the question is so important in the administration of the Federal Courts it would seem obvious that the question cannot be considered resolved until it has been finally determined by the Supreme Court of the United States. If such a determination is ultimately made—to the effect that the transferee court will apply the public policy of the transferee state, and if in the meantime Pennsylvania has followed *Kilberg*, the transfer will have created the anomalous result (and perhaps the unconstitutional result) that Pennsylvania citizens who have brought their cases in Federal Courts in Pennsylvania simply because their citizenship is diverse to the citizenship of the defendant are denied the benefits of Pennsylvania public policy, while other Pennsylvania citizens obtain the benefits of Pennsylvania policy in Pennsylvania State Courts.

The problem that the court below has created becomes graphic if one assumes, for the moment, that Pennsylvania has followed the *Kilberg* doctrine. Certainly if Pennsylvania State Courts had pronounced this doctrine it would be wrong, and probably unconstitutional, to transfer these [fol. 60] cases to Massachusetts, so long as there is any doubt about the ability of the transferee court to follow Pennsylvania courts in applying the *Kilberg* doctrine.

The least Respondent can do, having once decided to transfer these cases to Boston, would seem to be to protect, as far as possible, the rights of the Petitioners under Pennsylvania public policy. This can be accomplished by the proposed amendments to the order of transfer, which would condition the transfer on a stipulation by the defendant airline to have Pennsylvania public policy applied, and/or to make the application of Pennsylvania public policy the law of the case.

Certainly this would strengthen, if not insure, the transferee court's ability to apply Pennsylvania public policy.

VIII. *The Unsettled Question of The Law to be Applied by the Transferee Court.*

The Respondent, Judge Van Dusen, did not intend to deprive the Petitioners of the benefits of Pennsylvania public policy if such public policy is enunciated before the termination of the litigation. In his order denying the motion to amend the order of transfer he indicates that to him it appears that the transferee district will follow the law of the transferor district, including its public policy. The difficulty, however, is that the transferee court may not have the *power* to do so.

Briefly stated, the problem arises out of the basic proposition established by *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938) that a federal district court must apply the substantive law of the state in which it sits. This substantive [fol. 61] law includes its conflict of laws rules, *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941) and it also includes the public policy of the state in which it sits, *Griffin* v. *McCoach*, 313 U.S. 498 (1941); and *Angel* v. *Bullock*, 330 U.S. 183 (1947). Thus it would seem initially, and

basically, from these important Supreme Court decisions that the transferee court (the District Court of Massachusetts) in this case, would be obliged to follow the public policy of Massachusetts, rather than Pennsylvania, the transferor state.

The specific question has not, however, been decided by the Supreme Court of the United States.

The cases in which the question has come up are not too helpful. First, most of them involve statute of limitations questions where there has been an element of reliance by the plaintiff on the statute of limitations of the transferor state, and where there has thus been impetus to the courts to apply the transferor's law. The statute of limitations cases are therefore not a good guide to the ultimate determination of conflict of laws with respect to public policy.

Secondly, most of the cases are decisions by the transferor court, which may or may not have been followed by the transferee court. The question of the *power* of the transferee court to apply the public policy of the transferor state, has not really been adequately raised. Nevertheless, it has been held, or at least strongly suggested that the transferee court *must* apply the law (including [fol. 32] the public policy) of the state in which *it* sits, rather than the law of the transferor state, *Reynolds* v. *Baltimore & Ohio Railroad Co.*, 185 F.2d 27 (7th Cir. 1950) cert. den. 340 U.S. 947 (1951); *Boughton* v. *Shoulders*, 116 F.Supp. 391 (W.D. Ky. 1953); *Viaggio* v. *Field*, 177 F.Supp. 643 (DC Md. 1959); *Frechoux* v. *Lykes Brothers S.S. Company, Inc.*, 117 F.Supp. 234 (SD NY 1953); *Crawford* v. *The S.S. Shirley Lykes*, 148 F.Supp. 958 (SD NY 1957); *Kaufman, Observations on Transfers under Section 1404(a) of the New Judicial Code*, 10 FRD 595.

The cases cited on page 15 of the lower court's opinion on transfer suggest or indicate that, at least in statute of limitations situations, the transferee court will follow the law of the transferor, *Headrick* v. *Atchison, T. & S.F. Ry. Co.*, 182 F.2d 305, 309-310 (10th Cir. 1950); *Gomez* v. *The SS. Dorothy*, 183 F.Supp. 499, 512 (D. Puerto Rico 1959); *Hargrove* v. *Louisville & Nashville Railroad Company*, 153 F.Supp. 681, 684 (W.D. Ky. 1957); *Greve* v. *Gibraltar Enterprises*, 85 F.Supp. 410, 414 (D. New Mex. 1949). There is thus authority both ways.

There is authority, however, for the proposition that the courts will follow the "law of the case" doctrine in transfer cases. In 1 Moore, Section 4201 et seq. it is stated:

> "When, therefore, a federal court enunciates a rule of law to be applied in the case at bar it not only establishes a precedent for subsequent cases . . . but, as a general proposition, it establishes the law, which other courts owing obedience to it *must*, and which it itself will, normally apply to the same issues in subsequent proceedings in that case."

[fol. 63] And, with specific reference to transferred actions, Professor Moore states (1 Moore 0.404[8]):

> "ordinarily one judge does not consider a point previously decided by another judge of coordinate jurisdiction, and hence such pre-transfer rulings should ordinarily stand. But departure from a prior ruling, just as in any other law of the case situation, is at times warranted."

Further support for the proposition that a specific ruling by Respondent to the effect that Pennsylvania public policy will apply, will aid the transferee court in following such public policy is found in the words of Judge Learned Hand, in *Magnetic Engineering Co.* v. *Dings Manufacturing Co.*, 178 F.2d 866, 868 (2d Cir. 1950):

> "When an action is transferred, it remains what it was; all further proceedings in it are merely referred to another tribunal, leaving untouched whatever has already been done."

IX. *A Writ of Mandamus is Thus Necessary to Protect Petitioners' Rights.*

As matters now stand Petitioners' actions will be transferred to the United States District Court for the District of Massachusetts without Petitioners having any assurance that the Court can or will enforce Pennsylvania public policy, if such policy has been pronounced by Pennsylvania State Courts. Petitioners, and the beneficiaries of these

actions, may, therefore, suffer irreparable harm by virtue of this transfer. Petitioners therefore ask this Court to issue a writ of mandamus directing the Honorable Francis L. Van Dusen, Judge, to modify the order of transfer so as to provide protection to the Petitioners, or, in the alterna-
[fol. 64] tive, directing the Respondent to vacate the order of transfer.

X. *A Stay is Necessary to Prevent Transfer While this Petition is Being Considered.*

Petitioners respectfully request this Court to issue a temporary restraining order staying the order of transfer until this Court has had an opportunity to consider this Petition. In addition Petitioners request that this Court, if it decides to deny this Petition, stay the transfer until Petitioners have had an opportunity to take the question to the Supreme Court of the United States. There would appear to be a serious possibility of the Supreme Court granting review, because of the importance of the question in terms of Federal jurisdiction, practice, and procedure, and because of the Supreme Court's primary responsibility for the administration of justice in the Federal Courts.

XI. *Copies of this Petition Have Been Served Upon Respondent and Counsel for the Defendant in the Proceedings Below.*

Wherefore, Petitioners respectfully pray the issuance of the above order and writ.

Respectfully submitted,

Abram P. Piwosky, David M. Hass, Attorneys for Petitioners. Of counsel: Lee S. Kreindler, Kreindler & Kreindler, 51 Chambers Street, New York 7, New York.

[fol. 65] *Duly sworn to by Lee S. Kreindler, jurat omitted in printing.*

[fol. 66] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13994

BARRACK, et al.,

v.

HONORABLE FRANCIS L. VAN DUSEN, *ex rel.*
EASTERN AIR LINES, INC., et al.

Present: Biggs, Chief Judge, and Goodrich and Hastie, Circuit Judges.

ORDER DENYING PETITION—April 10, 1962

And Now, to wit, this 10th day of April, 1962, it is

Ordered that the temporary restraining order entered herein on April 6, 1962 be and the same hereby is vacated and set aside; and it is

Further Ordered that the petition for mandamus or prohibition or both filed herein on April 6, 1962 be and the same hereby is denied.

By the Court,

Biggs, Chief Judge.

[fol. 67] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,997

SIDNEY W. POPKIN; MARY B. GRICE, Executrix of the Estate of DAVID S. GRICE, deceased; DOROTHY WEINSTEIN, Executrix of the Estate of RALPH WEINSTEIN, deceased; DIANE BRAFF, Administratrix ad Prosequendum and as General Administratrix of the Estate of BERNARD JAY BRAFF, deceased; EMANUEL WEINSTEIN, Administrator of the Estate of HILDA LONDON, deceased; RONALD LONDON, Administrator c.t.a. of the Estate of PHILIP LONDON, deceased; ATTILO E. ABATE, Administrator of the Estate of FREDERICK N. ABATE, deceased; THELMA P. FREEMAN and PROVIDENT TRADESMENS BANK AND TRUST COMPANY, co-executors of the Estate of ADDISON B. FREEMAN, JR., deceased; EDNA E. LONG and LAURA MANNEY, Administratrices of the Estate of SHIRLEY E. REITZ, deceased, Petitioners,

vs.

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, Respondent.

Present: Biggs, Chief Judge, and Goodrich and Hastie, Circuit Judges.

ORDER DENYING PETITION—April 12, 1962

Upon consideration of the petition for writ of mandamus, prohibition, or both, filed in the above case;

It is Ordered that the petition be, and it is hereby denied.

By the Court,

William H. Hastie, Circuit Judge.

[fol. 68] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,994

BARRACK, et al.
v.
HONORABLE FRANCIS L. VAN DUSEN, *ex rel.*
EASTERN AIR LINES, INC., et al.

PETITION FOR RE-HEARING FOR WRIT OF MANDAMUS OR PROHIBITION BEFORE THE ENTIRE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT—Filed April 11, 1962

To the Honorable, the Judges of the Said Court:

The above captioned petitioners, by their attorneys, Richter, Levy, Lord, Toll & Cavanaugh, respectfully represent:

1. That on April 6, 1962 they did file a Petition for Writ of Mandamus or Prohibition to restrain the Honorable Francis L. Van Dusen from transferring ten cases, nine of which are Wrongful Death and Survival actions against the Eastern Airlines, Inc., General Motors Corporation, Lockheed Aircraft Corp., and ten separate cases by the same plaintiffs against the United States of America for damages arising out of a crash by an Eastern Airlines plane at or near Logan Airport in Boston, Massachusetts.

2. All of these persons had purchased tickets from Philadelphia to Boston and back on the said airline.

[fol. 69] 3. That all of the petitioners are residents and citizens of the Eastern District of Pennsylvania.

4. That the petitioners are the duly appointed personal representatives of Pennsylvania domiciliaries who were

passengers on said airplane and whose deaths were the result of the said crash.

5. That the said airplane at the time of said crash was en route to Philadelphia, Pennsylvania.

6. That actions to recover damages for said personal injuries and deaths were instituted by petitioners in the United States District Court for the Eastern District of Pennsylvania against Eastern Air Lines, Inc., Lockheed Aircraft Corp., and General Motors Corporation, said actions being Civil Actions Nos. 29274, 29099, 28741, 28763, 29615, 28762, 29160, 29159, 30266, 30200, and against the United States of America, said actions being Civil Action Nos. 29275, 29100, 28764, 28789, 29616, 28788, 29162, 29161, 30263 and 30230.

7. That each of the parties sued is doing business in and is subject to service in the Eastern District of Pennsylvania and has been duly served.

8. That the defendants herein named have moved for transfer to the United States District Court in Massachusetts under 28 U.S.C.A. Section 1404(a), which motions were opposed by the petitioners.

[fol. 70] 9. That a Massachusetts Punitive Statute limits recovery in wrongful death actions to between $2,000 and $20,000, to be assessed with reference to the degree of culpability of the defendant.

10. That when plaintiff and plaintiff's decedent are domiciliaries of Pennsylvania the Constitution and public policy of Pennsylvania preclude the Pennsylvania courts and, under *Erie* v. *Tompkins*, 304 U.S. 64, 58 S.Ct. 817 (1938), the federal courts sitting in Pennsylvania from giving effect to the punitive limitations on the recovery of damages in wrongful death actions contained in said Massachusetts statute, and require that the Pennsylvania rule of compensatory damages be applied.

11. That the transferee court, the United States District Court for the District of Massachusetts, may not give effect to or accord petitioners the benefit of the Constitution and

public policy of Pennsylvania and may apply said Massachusetts Punitive Statute limiting recovery in wrongful death actions to the prejudice and irreparable harm of petitioners.

12. That Pennsylvania law and Pennsylvania public policy favoring the protection of Pennsylvania domiciliaries would follow the decision of the New York Court of Appeals in *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y. 2d 34, 211 N.Y.S. 2d 133, 172 N.E. 2d 56 (1961), in which suit was brought in New York by a New York domiciliary for the wrongful death of a New York domiciliary in a Massachusetts airplane crash and in which the New York Court of Appeals held that the liability and damage provisions of the Massachusetts Statute were severable and that the application of the punitive restriction of the Massachusetts Statute was violative of New York public policy and that therefore unrestricted compensatory damages [fol. 71] rather than the nominal punitive limitation imposed by Massachusetts law would govern.

13. That by reference to Pennsylvania law and Pennsylvania public policy the District Court in which the within actions were filed would be bound to apply the rule of the *Kilberg* case, whereas upon transfer of the within causes to the District Court sitting in Massachusetts, the transferee court would not be so bound but on the contrary would apply the measure of damages provided by the penal death statute of the law of Massachusetts since Massachusetts has no compensatory wrongful death statute.

14. That the transfer of the said cases will thus deprive the petitioners, the survivors and next of kin of the decedents they represent, Pennsylvania domiciliaries all, of fundamental and substantial rights guaranteed them by the Pennsylvania Constitution and will violate the strong public policy of the Commonwealth of Pennsylvania which affords protection to its domiciliaries. The net result will be that instead of being awarded fair compensatory damages in the Eastern District of Pennsylvania, these widows and orphans will now be forced to travel to Massachusetts and will receive only the maximum of $20,000 under the Massachusetts Penal Statute.

15. That transfer of the within causes of action to the Federal Court in Massachusetts constitutes a violation of the Equal Protection Clause of the 14th Amendment to the Constitution of the United States in that it permits a non-resident defendant to engage in forum shopping not in fact for the convenience of parties or witnesses but for the purpose of obtaining a different rule of substantive law applicable to the measure of damages in the within causes of action.

[fol. 72] 16. That the order of transfer of the learned Judge below constitutes an abuse of discretion in that the public policy favoring the protection of petitioners as Pennsylvania domiciliaries under the substantive compensatory damage provisions of Pennsylvania vis-a-vis the restrictive punitive provisions of Massachusetts constitutes a consideration of such magnitude as to far outweigh any policy in the instant cases which would favor transfer as a matter of convenience for some of defendants' witnesses.

17. That the order of transfer constitutes an abuse of discretion in that and to the extent that the learned Judge below based his order of transfer on the conclusion that the proposed transferee district is "the only place where fair proceedings before trial and a fair trial for all parties on the issues of liability and culpability may be had . . ." (Opinion of Hon. Francis L. Van Dusen, District Judge, filed April 6, 1962, page 13).

18. That petitioners know of no reason whatsoever why fair proceedings before trial and a fair trial for all parties may not be had in the United States District Court for the Eastern District of Pennsylvania and with much greater likelihood that Pennsylvania's law and public policy as to compensatory damages and non-recognition of punitive statutes will be applied than if the causes are tried in a Federal Court sitting in Massachusetts.

19. That the private interest of the petitioner litigants, the interests of justice and convenience of witnesses and parties all balance overwhelmingly in favor of non-transfer.

[fol. 73] 20. That the order of transfer of the learned Judge below involves the transfer of cases to a transferee

district whose applicable rule as to damages is violative of the law and public policy of the transferor forum.

21. That the transfer of said cases will cause extreme hardship to the petitioners, most of whom are widows with minor children, who will be forced thereby to move to Boston for an extended and indefinite period of time, and to bring with them, and compensate for their time and trouble, their witnesses, almost all of whom, particularly on the issue of damages, are Pennsylvania residents, and many of whom may decline to attend at Boston.

22. That the matters herein involved were fully briefed and argued before the learned Judge below and that petition for re-argument with a view toward obtaining reversal of the order of transfer would be a futile and useless act.

23. The action of the District Judge in transferring these cases to Boston was predicated upon an Opinion in which it became clear that he weighed the alleged inconveniences to witnesses without having first resolved and decided the basic and original issue of law presented, to wit: would the law that the Massachusetts Court would apply as to the measure of damages be the same as the law which the Eastern District of Pennsylvania would be obliged to apply. If your petitioners would not get the benefit of the same applicable law in the transferee forum as it would get in the transferor forum, then obviously an injustice would be done by transfer and the Court [fol. 74] would have no reason to ever reach the question of inconvenience of witnesses at all.

24. The Honorable John C. Biggs, C.J. and Goodrich and Hastie, JJ., on April 10, 1962 did deny the petition without a hearing and without indicating whether their action was based on the view that the Mandamus or Prohibition does not lie or on the view that the action of the lower Court on the substantive question of whether an injustice would be done the plaintiffs by transfer was correct.

Wherefore, your petitioners respectfully requests that this matter be circulated to all the Judges of the United States Court of Appeals for the Third Circuit for their

deliberation and for such action as is properly indicated upon consideration of the facts set forth hereinabove. Your petitioner further requests that if this petition is denied, the Court respectfully indicate the ground upon which such denial is based.

Respectfully submitted,

Richter, Levy, Lord, Toll & Cavanaugh, By B. Nathaniel Richter, Counsel for Petitioners.

[fol. 75]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13997

SIDNEY W. POPKIN; MARY B. GRICE, Executrix of the Estate of DAVID S. GRICE, Deceased; DOROTHY WEINSTEIN, Executrix of the Estate of RALPH WEINSTEIN, Deceased; DIANE BRAFF, Administratrix ad Prosequendum and as General Administratrix of the Estate of BERNARD JAY BRAFF, Deceased; EMANUEL WEINSTEIN, Administrator of the Estate of HILDA LONDON, Deceased; RONALD LONDON, Administrator c.t.a. of the Estate of PHILIP LONDON, Deceased; ATTILIO E. ABATE, Administrator of the Estate of FREDERICK N. ABATE, Deceased; THELMA P. FREEMAN and PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Co-Executors of the Estate of ADDISON B. FREEMAN, JR., Deceased; EDNA E. LONG and LAURA MANNEY, Administratrices of the Estate of SHIRLEY E. REITZ, Deceased, Petitioners,

v.

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, Respondent.

Petition for Rehearing Before the Court en Banc—Filed April 14, 1962

To the Honorable, the Judges of the Said Court:

The plaintiffs, by their attorneys, Messrs. Freedman, Landy and Lorry, respectfully petition to have this court en banc re-consider the petition for writ of Mandamus, Prohibition or both, to be issued directing the Honorable Francis L. Van Dusen, Judge of the Eastern District of Pennsylvania, to vacate his order transferring the above-captioned causes to Massachusetts pursuant to 28 U.S.C., Sec. 1404 (a), and in support represent as follows:

1. The above-captioned causes arise from the crash of an airplane into the navigable waters of Boston harbor in [fol. 76] Massachusetts on October 4, 1960, just after the start of a flight whose destination was Philadelphia.

2. All of the defendants are doing business or have agreed to the acceptance of service of process within the Eastern District of Pennsylvania and have been duly served.

3. The plaintiffs are the personal representatives of decedents who were Pennsylvania domiciliaries (as are the beneficiaries of any recovery), except for the Abate case, Civil Action Nos. 30300 and 30307 and the Braff Case, Civil Action Nos. 29884 and 30304 and for one plaintiff who although a Pennsylvania domiciliary survived the crash.

4. Each of the defendants moved for transfer to Massachusetts pursuant to 28 U.S.C., 1404(a).

5. Each of the plaintiffs opposed the motion to transfer.

6. On December 15, 1961, a hearing was held before Judge Van Dusen whereby arguments were propounded on both sides regarding the motion to transfer.

7. By an opinion and order entered April 6, 1962, Judge Van Dusen transferred the above causes to Massachusetts.

8. On April 10, 1962, plaintiffs presented a petition before this court for a writ of mandamus, prohibition or both, pursuant to 28 U.S.C., Sec. 1651, asking that Judge Van Dusen be directed to vacate the transfer order.

[fol. 77] 9. On April 12, 1962, three members of this Honorable Court, Judges Biggs, Hastie and Goodrich, summarily denied this petition, per curiam.

10. The summary denial of the plaintiff's petition will result in irreparable prejudice to their substantial rights and therefore they request leave to present written and oral argument in support of the petition.

11. The nexus of petitioners' earnest desire to retain these cases within the third circuit is the Massachusetts Wrongful Death Statute (Ann. Laws of Mass., Ch. 229, Sec. 3(a)), which limits the amount of recovery to $20,000.00 and assesses his liability on the degree of culpability.

12. Petitioners submit that the Pennsylvania law and public policy as enunciated by its courts, legislature and constitution (Article III, Sec. 21) would follow the case of *Kilberg* v. *Northeastern Airlines*, 9 N.Y. 2d 34, 172 N.E. 2d 526 (N.Y. Ct. of Appeals, 1961) in denying the application of the restriction on recovery contained in the aforementioned Massachusetts Wrongful Death Statute. This contention is grounded upon the fact that the same considerations existing herein as existed in the Kilberg case; to wit, a public policy of the domiciliary state directly contra to that of Massachusetts, the plaintiffs, decedents, and beneficiaries of any recovery being citizens of the forum state; the contract of transportation having been entered into in [fol. 78] Pennsylvania; the situs of the crash being solely fortuitous; and the flight's destination being Pennsylvania.

13. It is highly probable that a federal court sitting in Massachusetts will not give the fullest effect to the aforementioned Pennsylvania public policy.

14. It is also highly probable that should a federal court sitting in Massachusetts seek to give effect to the aforementioned Pennsylvania public policy and to charge a jury to apply the "Kilberg doctrine" a jury of Massachusetts citizens dealing with a highly unfamiliar method of assessing damages and forced to apply dissimilar standards as between the Pennsylvania and the Massachusetts residents who were also passengers on the ill-fated flight would not

award fair and just amounts to the personal representatives of the deceased Pennsylvanians.

15. Petitioners submit that unless immediately reviewed, the transfer order will as a practical matter never be reviewed at all, as this court has previously noted. *Paramount Pictures* v. *Rodney*, 186 F. 2d 111, (1951) cert den 71 S. Ct. 572; *Pennsylvania Turnpike Commission* v. *Welsh*, 188 F. 2d 447 (1951). Also, see *In Re Josephson*, 218 F. 2d 174, 181-183 (C.A. 1, 1954).

16. Petitioners further submit that there is here presented an "extraordinary situation," [1] as the practical effect [fol. 79] of the transfer order is to deprive petitioners of any real opportunity to attain a just measure of compensation. Aside from the fact that the convenience of neither the plaintiffs nor the witnesses will actually be served should trial be held in Massachusetts, plaintiffs would also be forced to seek to convince the one court to whom a $20,000.00 maximum evaluation of life is a familiar and perhaps ordinary occurrence to overrule the Massachusetts statute. Assuming the detachment and impartiality of a federal judge could achieve that result, petitioners are then faced with a jury of Massachusetts citizens who will be told they must limit recovery for the deaths of the large block of Massachusetts passengers, but should steadfastly ignore that limitation as to the Pennsylvanians. The natural tugs of symmetry and the bewilderment and sense of injustice that laymen must inevitably feel could easily lead them to choose the convenient refuge of similar or uniform awards to the serious detriment of the Pennsylvanians.

17. Petitioners respectfully submit that Judge Van Dusen abused the discretion afforded him by way of 28 U.S.C., Sec. 1404(a), and this can only be demonstrated

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[1] *Ex parte Fahey*, 332 U.S. 258, 259-260 (1947), *In Re Josephson, supra*, *Clayton* v. *Warlick*, 232 F. 2d 699 (C.A. 4, 1956), *Pan Handle Eastern Pipe Line Co.* v. *Thornton*, 267 F. 2d 459 (C.A. 6, 1959), *LaBuy* v. *Howes Leather Co.*, 352 U.S. 249, 264 (1957) (where Justice Brennan, speaking for himself and Justices Frankfurter, Harlan, and Burton specifically approve the use of mandamus to immediately correct an erroneous transfer order).

to this court by written and oral argument as "extraordinary situation" is by definition incapable of prior formulation. Petitioners would point out, however, that there [fol. 80] is a substantial body of law, holding that failure to consider and/or discuss all the elements in 28 U.S.C., Sec. 1404 (a) and *Gulf Oil Corp.* v. *Gilbert*, 330 U.S. 501, 509 (1946) is an abuse of discretion justifying mandamus. *Wiren* v. *Laws*, 194 F. 2d 873 (D.C. Cir. 1951); *Gulf Research and Development Co.* v. *Harrison*, 185 F. 2d 457 (C.A. 9, 1950); *Comfort Equipment Co.* v. *Steckler*, 212 F. 2d 371 (C.A. 7, 1954); *A. C. Neilsen Co.* v. *Hoffman*, 270 F. 2d 693 (C.A. 7, 1959); see cases cited in footnote.

18. Petitioners respectfully submit that all of the considerations against transfer, if brought to the attention of this court by way of written and oral argument, as they were presented to Judge Van Dusen, would make it manifestly clear that transfer was inappropriate and presents extraordinary hardship upon the plaintiffs and, therefore, constitutes an abuse of the District Court's discretion.

19. The order granting transfer having been held by this court to be not otherwise appealable, and by its very nature not appealable at any other stage of the litigation or in any other court, this petition is the plaintiffs' sole opportunity to vindicate their contention.

20. Petitioners respectfully submit that immediate restraint is necessary so as to avoid transfer and having this petition become moot.

Wherefore, petitioners respectfully move this Honorable [fol. 81] Court to issue a restraining order and to grant a rule on the respondent, the Honorable Francis L. Van Dusen to show cause why a writ of mandamus, prohibition or both should not be issued prohibiting transfer of the above-captioned causes, and reconsidering this matter en banc, giving the plaintiffs the opportunity to present argument.

Respectfully submitted,

Freedman, Landy and Lorry, By: Milton M. Borowsky, Attorneys for Petitioners.

[fol. 82] *Duly sworn to by Milton M. Borowsky, jurat omitted in printing.*

[fol. 83] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13994

BARRACK, et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 13997

POPKIN, et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, etc.

No. 14003

RAPP, Administrator, et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14011

BIERNBAUM, et al., Executors, etc., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

Present: BIGGS, Chief Judge, and GOODRICH and HASTIE, Circuit Judges.

ORDER STAYING TRANSFER—April 23, 1962

It is Ordered that the orders of the United States District Court for the Eastern District of Pennsylvania, transferring Civil Actions Numbers:

29274	28664	30078	29768	29724
29099	29881	30346		30079
28741	29882	30284		30288
28763	29883			30289
29615	29884			
28762	29901			
29160	30257			
29159	30258			
30266	30259			
30200	30260			
29275	30300			
29100	30301			
28764	30302			
28789	30303			
29616	30304			
28788	30305			
29162	30306			
29161	30307			
30263	30343			
30230	30344			

to the United States District Court for the District of [fol. 84] Massachusetts be and the same are hereby stayed until further order of this Court.

Biggs, Chief Judge.

By the Court,

Dated: April 23, 1962

[fol. 85] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13994

ROBERTA BARRACK, Administratrix of the estate of JACK M. BARRACK, deceased, et al., petitioners,

vs.

HONORABLE FRANCIS L. VAN DUSEN, District Judge of the United States District Court for the Eastern District of Pennsylvania, et al.

Present: BIGGS, Chief Judge, and GOODRICH and HASTIE Circuit Judges.

ORDER GRANTING PETITION FOR REHEARING, ETC.—
June 12, 1962

It is Ordered that:

1. the petition for rehearing in the above entitled case be and it hereby is granted;
2. the order of April 10, 1962 denying the petition for writ of mandamus or prohibition be and it hereby is vacated.

By the Court,

Biggs, Chief Judge.

[fol. 86] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13994

BARRACK, et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 13997

POPKIN, et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, etc.

No. 14003

RAPP, Administrator, et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14011

BIERNBAUM, et al., Executors, etc., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14033

LAISTER, Executrix, etc., et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

Present: Biggs, Chief Judge, and Goodrich and Hastie, Circuit Judges.

Order re Filing of Answers, etc.—June 12, 1962

Upon consideration of the petitions for writs of mandamus and prohibition filed in the above entitled cases,

It is Ordered that:

1. the respondent, the Honorable Francis L. Van Dusen, file answers to the petitions on or before June 28, 1962, and if he deems it desirable, file one consolidated answer to all of the petitions;

2. the defendants in the Civil Actions in the District Court, Eastern Airlines, Inc., Lockheed Aircraft Corp., General Motors Corporation and the United States of America, be and they hereby are granted leave to intervene;

3. the petitioners in each of the above entitled cases file and serve the briefs and appendices in their respective cases on or before July 28, 1962;

[fol. 87] 4. the respondent and intervenors file and serve their briefs and appendices on or before August 27, 1962, which briefs and appendices, if they deem it desirable, may be joint and consolidated for all the cases;

5. the petitioners file and serve their reply briefs, if any, on or before September 11, 1962;

6. the Clerk schedule the above cases for oral argument at a session in September, 1962.

By the Court,

Biggs, Chief Judge.

Dated: June 12, 1962

[fol. 88] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT
No. 13997

SIDNEY W. POPKIN, et al., petitioners

vs.

THE HONORABLE FRANCIS L. VAN DUSEN, District Judge of the United States District Court for the Eastern District of Pennsylvania, et al.

Present: BIGGS, Chief Judge, and GOODRICH and HASTIE Circuit Judges.

ORDER GRANTING PETITION FOR REHEARING, ETC.—
June 12, 1962

It is Ordered that:

1. the petition for rehearing in the above entitled case be and it hereby is granted;
2. the order of April 12, 1962 denying the petition for writ of mandamus or prohibition be and it hereby is vacated.

By the Court,

Biggs, Chief Judge.

[fol. 89] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,994

BARRACK, et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 13,997

POPKIN, et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, etc.

No. 14,003

RAPP, Administrator, et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN

No. 14,011

BIERNBAUM, et al., Executors, etc., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN

No. 14,033

LAISTER, Executrix, etc., et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN

Answer of Respondent to Petitions for Writs of Mandamus and Prohibition—Filed June 27, 1962

To the Honorable, the Judges of the United States Court of Appeals for the Third Circuit:

Respondent, Honorable Francis L. Van Dusen, hereby makes answer to the several Petitions for Writs of Mandamus and Prohibition filed in the above-entitled cases, as follows:

[fol. 90] 1. Those allegations of the Petitions for Writs of Mandamus and Prohibition which are matters of record in the civil actions in which respondent entered his orders dated April 6 and April 27, 1962 are admitted.

2. Those allegations of the Petitions for Writs of Mandamus and Prohibition which are statements of fact which are in accordance with the findings embodied in the Opinion of respondent dated April 6, 1962, a copy of which is attached to the Petitions in Nos. 13,994 and 13,997, are admitted.

3. Those allegations of the Petitions for Writs of Mandamus and Prohibition which are statements of fact which are contrary to the findings embodied in respondent's Opinion dated April 6, 1962 are denied, including, but not limited to such paragraphs as 19 and 23 of the Petition in No. 13,994 and paragraph 15 of the Petition in No. 13,997.

4. Respondent is without knowledge or information sufficient to form a belief as to the truth of those allegations of the Petitions for Writs of Mandamus and Prohibition which are statements of fact which are not of record and which are neither supported nor controverted by the findings embodied in the respondent's Opinion dated April 6, 1962.

5. No answer is required to those allegations of the Petitions for Writs of Mandamus and Prohibition which are conclusions of law, but in answer thereto, respondent hereby incorporates the conclusions embodied in his Opinions dated April 6 and April 27, 1962.

6. Respondent avers that he carefully considered the interests stipulated in the provisions of Title 28 U.S.C. [fol. 91] §1404(a); carefully considered the legal rights and interests of petitioners; and carefully considered the matters submitted to him by counsel for the parties in their motions, affidavits, briefs, letters, other memoranda and oral arguments prior to the entry of his order transferring these civil actions to the United States District Court for the District of Massachusetts, and that he carefully reconsidered the same matters before entering his order dated April 27, 1962.

7. Respondent avers that his orders, dated April 6 and April 27, 1962, were based on the findings and conclusions contained in Respondent's Opinions dated April 6 and April 27, 1962, all of which are incorporated herein.

8. Respondent avers that the entry of the orders constituted an exercise of discretion within the jurisdiction conferred on the District Court by Congress in Title 28 U.S.C. §1404(a). Respondent believes, and therefore avers, that he faithfully exercised his discretion in entering these orders in accordance with the provisions of Title 28 U.S.C. §1404(a) as interpreted and applied by the decisions of this Court and of the United States Supreme Court.

9. Respondent denies that these orders are in violation of any act of Congress or of the Constitution of the United States; denies that these orders constitute an injustice to any of the petitioners; and denies that they deprive any of the petitioners of any legal right.

10. Respondent respectfully submits that in accordance with the language of 28 U.S.C.A. §1404(a), as worded by Congress, and the prior decisions of this Court, his exercise of discretion in entering these orders on the record before him is not reviewable by this Court.

11. Respondent respectfully submits that the entry of these orders is not reviewable on Petitions for Writs of [fol. 92] Mandamus or Prohibition, and that the extraordinary remedy of the Writ of Mandamus and Prohibition is not available to petitioners on this record.

12. Respondent denies that there was or is any need to restrain the transfer of these cases by the Clerk of the United States District Court for the Eastern District of Pennsylvania and, hence, denies paragraph 25 of the Petition in No. 13,994, paragraph 18 of the Petition in No. 13,997, and paragraph X of the Petition in No. 14,033.

Wherefore respondent prays that the Petitions for Writs of Mandamus and Prohibition be dismissed.

Owen B. Rhoads, Dechert, Price & Rhoads, Attorneys for Respondent, 1600 Three Penn Center Plaza, Philadelphia 2, Pennsylvania.

Robert E. Jones, Rawle & Henderson, Attorneys for Respondent, 1910 Packard Building, Philadelphia 2, Pennsylvania.

Sidney L. Wickenhaver, Montgomery, McCracken, Walker & Rhoads, Attorneys for Respondent, 1421 Chestnut Street, Philadelphia 2, Pennsylvania.

Morton Hollander, Chief, Appellate Section, Attorney for Respondent, United States Department of Justice, Washington 25, D. C.

[fol. 93] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

Nos. 13994, 13997, 14003, 14011, 14033

ROBERTA BARRACK, Admx., etc., et al.,
Petitioners in No. 13994,

SIDNEY W. POPKIN, et al.,
Petitioners in No. 13997,

HOWARD H. RAPP, Admr., etc., et al.,
Petitioners in No. 14003,

LEAH BIERNBAUM, Extrs., etc., et al.,
Petitioners in No. 14011,

DORIS A. LAISTER, Extrx., etc., et al.,
Petitioners in No. 14033,

v.

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, Respondent,

and

EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION, GENERAL MOTORS CORPORATION and THE UNITED STATES OF AMERICA, Intervenors.

ON PETITIONS FOR WRITS OF MANDAMUS OR PROHIBITION —Argued October 2, 1962

Before STALEY and FORMAN, Circuit Judges, and LANE, District Judge.

[fol. 94]

OPINION OF THE COURT—Filed November 19, 1962

By STALEY, Circuit Judge.

Petitioners seek writs of mandamus or prohibition directing respondent to vacate and set aside his order transferring these actions to the United States District Court for the District of Massachusetts. The order was entered pursuant to § 1404(a) of 28 U.S.C.,[1] but has been stayed pending the disposition of these petitions.

The actions arise out of the crash of an Eastern Air Lines Electra airplane in Boston Harbor on October 4, 1960. These suits were filed in the District Court for the Eastern District of Pennsylvania by two survivors of the crash and by the personal representatives of several deceased passengers. Named as defendants were Eastern Air Lines, Inc., Lockheed Aircraft Corp., General Motors Corp., and in several instances, the United States. On April 6, 1962, respondent entered an order granting defendants' motions for transfer pursuant to an opinion filed that same day.[2]

With respect to the death actions, petitioners assert that respondent was without power to enter the order of transfer because the Massachusetts District Court is not a district where these actions "might have been brought" within the meaning of § 1404(a). Additionally, they argue that because the transferee forum may apply a different rule of substantive law to these suits,[3] the order should be [fol. 95] vacated as a matter of law. Lastly, they contend

[1] "§ 1404. Change of venue

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1958 ed.).

[2] The opinion is reported at 204 F. Supp. 426.

[3] The Massachusetts Death Act provides in relevant part:

"A person who (1) by his negligence causes the death of a person in the exercise of due care * * * shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability * * *." Mass. Ann. Laws, C. 229, § 2. It has been held to be punitive in nature. Massachusetts Bonding & Ins. Co. v. United States, 352 U.S. 128 (1956).

that the order constitutes a clear abuse of discretion. Because we hold that respondent did not have power to transfer these actions, we find it unnecessary to consider petitioners' alternative arguments.

At the outset, we are faced with defendant-intervenors' contention that the petitions for writs of mandamus or prohibition are inappropriate in these circumstances. It must be noted that respondent does not join in presenting this argument.

Our recent decision in Swindell-Dressler Corp. v. Dumbauld, — F.2d — (C.A.3, 1962), makes it abundantly clear that mandamus is appropriate when the question presented is whether the district court acted without jurisdiction in granting a motion to transfer under § 1404(a). However, intervenors urge that petitioners had an adequate remedy of appeal under the provisions of the Interlocutory Appeals Act, 28 U.S.C.A. § 1292(b).[4] But that very issue was squarely raised in *Swindell-Dressler* and was decided in the negative.[5] We, therefore, conclude that these petitions are properly before us.

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[4] "§ 1292. Interlocutory decisions

• • •

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order • • •." 28 U.S.C. § 1292(b) (1958 ed.).

[5] As we indicated in Milbert v. Bison Laboratories, Inc., 260 F.2d 431, 433 (C.A.3, 1958), a portion of the legislative history of § 1292(b) would appear to support intervenors' contention. However, as we there pointed out, the district judge's written statement in the order, conforming to the language of the statute, is an essential condition precedent before we may even entertain an application for permission to appeal. Here, respondent, being fully aware of the provisions of § 1292(b), failed to include such a statement in his order. Moreover, as heretofore indicated, he has expressly dissociated himself from intervenors' argument as to the availability of § 1292(b) and the propriety of mandamus.

On the merits, petitioners contend that because the personal representatives in the death actions have not ob-
[fol. 96] tained ancillary appointment in Massachusetts, they lack capacity to bring the actions in that state, and thus § 1404(a) does not authorize transfer to that district. Initially, reference is made to Rule 17(b) of the Federal Rules of Civil Procedure, which provides in relevant part: "In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held * * *"

Next, petitioners point out that under the law of Massachusetts a personal representative appointed in another state is not thereby qualified to maintain suit in Massachusetts, Boutillier v. Wesinger, 322 Mass. 495, 78 N.E.2d 195 (1948), and that appointment as an ancillary or special administrator is in the discretion of the Massachusetts probate judge, Mass. Ann. Laws, C. 193, § 10. Finally, the Supreme Court's decision in Hoffman v. Blaski, 363 U.S. 335 (1960), is cited as being dispositive of the issue before us.

In *Hoffman*, the district court in which suit had been properly brought transferred it to a district which did not have venue of the cause. The Supreme Court, affirming the judgment of the Seventh Circuit, held that this defect precluded transfer. The phrase "where it might have been brought" was construed as applying to the time when suit was originally instituted. With respect to the argument that the venue defect had been waived by the defendant's motion to transfer, the Court said, "But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff." 363 U.S. at pp. 343-344.

Respondent and intervenors would limit the holding in Hoffman v. Blaski, supra, to the requirement that the transferee forum have both venue and jurisdiction of the cause. They state that the existence of other potential defenses does not preclude removal, and cite several cases in which
[fol. 97] transfer has been effected although the suits would have been barred by the statute of limitations applicable in

the transferee district.* Additionally, they argue that the phrase "the action" does not include the parties to the action.

We think that the holding in Hoffman v. Blaski, supra, compels the conclusion that respondent was without power to transfer these actions. The import of that decision is that unless the plaintiff *had an unqualified right to bring suit* in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a). Hence, the fact that at oral argument counsel for intervenors expressed a willingness to waive any objection to petitioners' capacity to sue in Massachusetts is beside the point. Nor can the district court's statement that these actions involve the legal fiction of the appointment of a personal representative be used as a basis for distinguishing them from Hoffman v. Blaski, supra. Certainly, the requirement of capacity to sue is no more a legal fiction than is the necessity for having proper venue. Obviously, it, like venue, can be waived. Rules 9(a) and 12(h), Fed. R. Civ. P. But waiver or the possibility of waiver did not alter the Supreme Court's conclusion in *Hoffman*. In short, we can perceive no basis in either logic or policy for making any distinction between the absence of venue in the transferee forum and a prospective plaintiff's lack of capacity to sue there.

A similar conclusion was reached in Felchlin v. American Smelting and Refining Co., 136 F. Supp. 577 (S.D. Calif. 1955). There, suit was filed by California executors, [fol. 98] and the defendant moved to dismiss or, in the alternative, to transfer the suit to the Western District of Texas. The court held that because Texas forbids suits by

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* H. L. Green Co. v. McMahon, — F.2d — (C.A.2, 1962); Headrick v. Atchison, T.&S.F.Ry., 182 F.2d 305 (C.A.10, 1950); Gomez v. S.S. Dorothy, 183 F. Supp. 499 (D. Puerto Rico, 1959); Crawford v. S.S. Shirley Lykes, 148 F. Supp. 958 (S.D.N.Y. 1957); Curry v. States Marine Corp. v. Delaware, 118 F. Supp. 234 (S.D. N.Y. 1954); Frechoux v. Lykes Bros. S.S. Co., 118 F. Supp. 234 (S.D.N.Y. 1953); Greve v. Gibralter Enterprises, 85 F. Supp. 410 (D.N.M. 1949). Six of these seven cases antedate Hoffman v. Blaski, supra. Moreover, the decisions in all seven were based upon the legal conclusion that the statute of limitations of the state of the transferor district would apply.

foreign executors, the proposed transferee forum was not a district "where the action might have been brought." Accordingly, the motion was denied.

Respondent and intervenors seek to distinguish *Felchlin* from the case at bar on the grounds that a suit by a foreign personal representative in Texas is a nullity, whereas in Massachusetts lack of capacity is a mere defense to the action and can be waived. However, we deem this distinction insubstantial, for whether lack of capacity precludes a prospective plaintiff from filing suit in the first instance, or subjects him to a dismissal at the instance of the defendant, the result is the same. In either case he does not have an unqualified right to sue.

The transfer sanctioned in Continental Grain Co. v. Barge FBL-585, 364 U.S. 19 (1960), is no help to respondent and intervenors, for that decision is premised on a fiction peculiar to the admiralty law.

The attempted differentiation between "the action" and the parties thereto is based on the language of Rules 13(h), 24, and 25(b) and (c) of the Federal Rules of Civil Procedure. We think it without merit. These rules refer to the addition, intervention, or substitution of parties to a law suit which has already been instituted. Thus, they necessarily make separate reference to the action and the parties to the action. More important, to say that the action and the parties thereto are separate and distinct is to ignore reality, for the identity of the parties is determinative of such basic matters as jurisdiction and venue.

The argument that petitioners could have brought these suits in Massachusetts, irrespective of the waiver of intervenors, by obtaining ancillary appointment misses the mark, for it ignores the fact that such appointment is discretionary with the probate court. Mass. Ann. Laws, C. 193, § 10. Of course, it is quite likely that most of these [fol. 99] petitioners would have been so appointed. That, however, is immaterial, for the fact remains that here, as in *Hoffman*, petitioners did not have an independent right to maintain suit in Massachusetts.

Respondent and intervenors urge that the construction which petitioners seek would unduly circumscribe § 1404(a) in any action brought by a personal representative. The

short answer to this is that by the use of the phrase "where it might have been brought" Congress intended that the power to transfer should not be unqualified. That most jurisdictions do not permit foreign personal representatives to bring suit in their courts as a matter of right is a well known rule of law, and we cannot presume that Congress intended to alter state policy to the extent of permitting transfer of such suits to the federal courts sitting in those states. Indeed, as we previously noted, Rule 17(b), Fed. R. Civ. P., requires the district court to refer to the law of the state in which it sits to determine capacity to sue. Finally, we must accept § 1404(a) as it has been construed by the Supreme Court in Hoffman v. Blaski, supra, i.e., that it permits transfer only if the plaintiff at the time of the commencement of the action had an independent right to institute suit in the transferee district.

Of course, our holding that the district court was without jurisdiction to transfer these suits relates only to the death actions. However, in light of this opinion the district court may wish to reconsider the transfer of the two personal injury suits, particularly as the death actions, which constitute the great majority of these suits, will now be tried in the Eastern District of Pennsylvania.

What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Subsequently, counsel informed this court by letter that the *Reitz* case (Civil [fol. 100] Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. Thus, with respect to these three suits, the district court's order of transfer was proper and will not be set aside.

We assume that it will not be necessary to issue the writ unless a petition for certiorari is filed, and that the district court will vacate the order of transfer in accordance with this opinion.

[fol. 101] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,994

ROBERTA BARRACK, Admx., etc., et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 13,997

SIDNEY W. POPKIN, et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 14,003

HOWARD H. RAPP, Admr., etc., et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14,011

LEAH BIERNBAUM, Extrs., etc., et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14,033

DORIS A. LAISTER, Extrx., etc., et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

Present: STALEY and FORMAN, Circuit Judges, and LANE, District Judge.

ORDER DIRECTING ISSUANCE OF WRITS OF MANDAMUS—
December 7, 1962

Upon consideration of the petitions for writs of mandamus or prohibition, of the anwers by respondent and of the briefs, and after hearing:

It is Ordered, Adjudged and Decreed by this Court that the prayers of the petitions be and the same hereby are granted and the Clerk of this Court is hereby directed to issue the writs of mandamus in accordance with the opinion of this Court.

By the Court,

Staley, Circuit Judge.

[fol. 102] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13994

BARRACK, et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 13997

POPKIN, et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14003

RAPP, Administrator, et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14011

BIERNBAUM, et al., Executors, etc., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14033

LAISTER, Executrix, etc., et al., petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN

PEREMPTORY WRIT OF MANDAMUS

United States of America,
Third Judicial Circuit, ss.

To the Honorable Francis L. Van Dusen, Judge of the United States District Court for the Eastern District of Pennsylvania, Greetings:

Whereas the Honorable Francis L. Van Dusen by order filed April 6, 1962 transferred to the United States District Court for the District of Massachusetts Civil Actions brought against Eastern Air Lines, Inc., Lockheed Aircraft Corp., and General Motors Corporation and Civil Actions brought against the United States, a copy of which order is attached to this writ and marked Exhibit "A"; and

Whereas the plaintiffs in the actions ordered to be transferred have filed petitions for writs of mandamus and prohibition directing the respondent to vacate and set aside his order of transfer; and

[fol. 103] Whereas the respondent has filed answers to the petitioners; and

Whereas the matter came on to be heard before this Court on the aforesaid petitions, answers and briefs; and

Whereas after due deliberation thereon this Court rendered its opinion November 19, 1962, that the Honorable Francis L. Van Dusen exceeded his authority when he entered the order of transfer on April 6, 1962, with respect to the civil actions in the death cases; and

Whereas on December 7, 1962 this Court caused to be entered herein its order, directing the Clerk of this Court to issue the writ of mandamus and prohibition in accordance with the opinion of the Court;

Now Therefore the Respondent, the Honorable Francis L. Van Dusen Is Hereby Required and Commanded, immediately after the receipt of this writ, and without delay to vacate and set aside the order of April 6, 1962 in the civil actions enumerated in Exhibit "B" attached to this writ.

Ida O. Creskoff, Clerk of the United States Court of Appeals for the Third Circuit.

Dated: December 14, 1962

[fol. 104]

EXHIBIT "A" TO PEREMPTORY WRIT OF MANDAMUS

IN THE UNITED STATES DISTRICT COURT

FOR THE EASTERN DISTRICT OF PENNSYLVANIA

Civil Actions Nos. 28664, 28741, 28762, 28763, 28764, 28788, 28789, 29099, 29100, 29159, 29160, 29161, 29162, 29274, 29275, 29615, 29616, 29724, 29768, 29881, 29882, 29883, 29884, 29901, 30078, 30079, 30200, 30230, 30258, 30260, 30263, 30266, 30284, 30288, 30289, 30300, 30301, 30302, 30303, 30304, 30305, 30306, 30343, 30344 and 30346

SIDNEY W. POPKIN

v.

EASTERN AIR LINES, INC., and LOCKHEED AIRCRAFT CORP., and GENERAL MOTORS CORPORATION and succeeding cases captioned in the orders of 10/17/61 (Document No. 24 in C. A. 28664) and 11/1/61 (Document No. 7 in C. A. 29724), except Civil Actions Nos. 30257, 30259, 30307, 30390 and 30391 and all Admiralty Actions.

ORDER SUR MOTIONS TO TRANSFER

(Documents Nos. 28, 29 & 30 in C. A. 28664; Nos. 30, 31 & 32 in C. A. 28741; Nos. 23, 24 & 25 in C. A. 28762; Nos. 26, 27 & 28 in C. A. 28763; Nos. 13 & 15 in C. A. 28764; Nos. 13 and 15 in C. A. 28788; Nos. 13 & 15 in C. A. 28789; Nos. 22, 23 & 24 in C. A. 29099; Nos. 12 & 14 in C. A. 29100; Nos. 22, 23 & 24 in C. A. 29159; Nos. 22, 23 & 24 in C. A. 29160; Nos. 11 & 13 in C. A. 29161; Nos. 11 & 13 in C. A.

29162; Nos. 22, 23 & 25 in C. A. 29274; Nos. 12 & 14 in C. A. 29275; Nos. 20, 21 & 22 in C. A. 29615; Nos. 9 & 11 in C. A. 29616; No. 9 in C. A. 29724; Nos. 15, 16 & 17 in C. A. 29768; Nos. 15, 16 & 17 in C. A. 29881; Nos. 15, 16 & 17 in C. A. 29882; Nos. 15, 16 & 17 in C. A. 29883; Nos. 15, 16 & 17 in C. A. 29884; Nos. 8 & 11 in C. A. 29901; Nos. 21, 22 & 23 in C. A. 30078; Nos. 20, 21 & 22 in C. A. 30079; Nos. 11, 12 & 13 in C. A. 30200; No. 7 in C. A. 30230; No. 2 in C. A. 30258; Nos. 12, 13 & 14 in C. A. 30260; No. 2 in C. A. 30263; Nos. 9, 10 & 13 in C. A. 30266; Nos. 15, 16, 17 & 24 in C. A. 30284; No. 6 in C. A. 30288; No. 6 in C. A. 30289; Nos. 13, 14 & 15 in C. A. 30300; Nos. 13, 14 & 15 in C. A. 30301; No. 11 in C. A. 30302; No. 4 in C. A. 30303; No. 2 in C. A. 30304; No. 11 in C. A. 30305; No. 2 in C. A. 30306; No. 12 in C. A. 30843; Nos. 13, 14 & 15 in C. A. 30344; Nos. 15, 16 & 17 in C. A. 30346)

AND NOW, April 6, 1962, IT IS ORDERED that the above-captioned cases are TRANSFERRED to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C.A. S 1404(a).

/s/ FRANCIS L. VAN DUSEN

CA. 30303

See Opinion filed earlier today.

CA 30304 The record indicates that this case should also be transferred due to improper venue in this District.

In this action, the Motion to Dismiss (Document No. 4) is being treated as an alternative Motion to Transfer in order to avoid precluding the plaintiff from recovering, and the District of Massachusetts is considered a more appropriate forum to which to transfer the case than the Middle District of Pennsylvania for the reasons stated in the above Opinion.

[fol. 105]

EXHIBIT "B" TO PEREMPTORY WRIT OF MANDAMUS

C. A. No. 28762

Barbara B. Meltzer, Admrx. of the Estate of
Allan J. Meltzer, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 28763

Henry C. Gransden, Adms. of the Estate of
Henry V. Gransden, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 28788

Barbara B. Meltzer, Admrx. of the Estate of
Allan J. Meltzer, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 28789

Henry C. Gransden, Admr. of the Estate of
Henry V. Gransden, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 29099

Lorraine Browndorf, Admrx. of the Estate of
Irving Browndorf, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29100

Lorraine Browndorf, Admrx. of the Estate of
Irving Browndorf, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

[fol. 106]

C. A. No. 29159

Elizabeth B. Schwartz, execx. estate
Theodore William Schwartz, deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29160

Ida G. Schwartz, execx. estate
Meyer A. Schwartz, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29161

Ida G. Schwartz, execx. estate
Meyer A. Schwartz, Deceased

v.

United States

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

C. A. No. 29162

Elizabeth B. Schwartz, execx. estate
Theodore William Schwartz, Deceased

v.

United States

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

C. A. No. 29274

Roberta Barrack, Admrx. of the Estate of
Jack M. Barrack, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29275

Roberta Barrack, Admrx. of the Estate of
Jack M. Barrack, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

[fol. 107]

C. A. No. 29615

J. Michael King and Berks County Trust Company, Executors of the Estate of Henry P. King, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29616

J. Michael King and Berks County Trust Company, Executors of the Estate of Henry P. King, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d. pty. deft.

C. A. No. 29724

Doris A. Laister, as Execx. of the Estate of Chester H. Laister, deceased

v.

Eastern Air Lines, Inc.

C. A. No. 29768

Leah Biernbaum and Dewey Hoffman, Executors of the Estate of Leonard Biernbaum, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29881

Edna E. Long and Laura Mauney, Admrxs. of the Estate of Shirley E. Reitz, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29882

Mary B. Grice, Execx. of the Estate of David S. Grice, Deceased

v.

Eastern Air Lines, Inc., et al.

[fol. 108]

C. A. No. 29883

Dorothy Weinstein, Execx. of the Estate of Ralph Weinstein, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29884

Diane Braff, Admrx. ad prosequendum and as General Admrx. of the Estate of Bernard Jay Braff, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30078

Howard H. Rapp, Admr. of the Estate of Richard F. Zeller, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30200

Joyce J. Wright, Admrx. of the Estate of
John Allen Wright, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30230

Joyce J. Wright, Admrx. of the Estate of
John Allen Wright, Deceased

v.

The United States of America

v.

Eastern Air Lines, Inc.

C. A. No. 30258

Ronald London, Admr. C. T. A. of the Estate of
Phillip London, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

[fol. 109]

C. A. No. 30260

Ronald London, Admr. of the Estate of
Philip London, deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30263

Ruth Staller, Admrx. of the Estate of
Philip Staller, Deceased

v.

The United States of America

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

C. A. No. 30266

Ruth Staller, Admrx. of the Estate of
Philip Staller, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30284

Nancy A. Frankenfield, Admrx. of the Estate of
George B. Frankenfield, Jr., Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30288

Selma Birenbaum, Abe Birenbaum and Abram P. Piowsky
as Executors of the Estate of Martin Birenbaum, deceased

v.

Eastern Air Lines, Inc.

C. A. No. 30289

Sylvia Barrack as the widow of Morris Barrack, deceased and the First Pennsylvania Bank and Trust Company, as Executors of the Estate of Morris Barrack, deceased

v.

Eastern Air Lines, Inc.

[fol. 110]

C. A. No. 30301

Thelma P. Freeman and Provident Tradesmens Bank and Trust Company, Co-Executors of the Estate of Addison B. Freeman, Jr., Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30302

Mary B. Grice, Execx. of the Estate of David S. Grice, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 30305

Dorothy Weinstein, Execx. of the Estate of Ralph Weinstein, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 30306

Thelma P. Freeman and Provident Tradesmens Bank and Trust Company, co-executors of the Estate of Addison B. Freeman, Jr., Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 30343

Joseph Thompson, Jr., Admr. of the Estate of Letha Mae Thompson, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., Third Pty. Defts.

[fol. 111]

C. A. No. 30344

Joseph Thompson, Jr., admr. of the Estate of Letha Mae Thompson, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30346

Donald A. Scott, Admr. of the Estate of Thomas L. Moody, Deceased

v.

Eastern Air Lines, Inc., et al.

[fol. 112] [File endorsement omitted]

IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,994

BARRACK, et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 13,997

POPKIN, et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 14,003

RAPP, Administrator, et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 14,011

BIERNBAUM, et al., Executors, etc., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 14,033.

LAISTER, Executrix, etc., et al., Petitioners

vs.

HONORABLE FRANCIS L. VAN DUSEN, et al.

ORDER STAYING EXECUTION OF PEREMPTORY WRIT OF MANDAMUS—December 26, 1962

Present: Staley and Forman, Circuit Judges, and Lane, District Judge.

Upon consideration of the petition for stay of the execution of the peremptory writ of mandamus in these cases filed by Intervenors, Eastern Airlines, Inc., Lockheed Aircraft Corporation and General Motors Corporation,

It is Ordered That,

1. The execution of the peremptory writ of mandamus shall be stayed for a period of thirty days from December 14, 1962;

2. If within the said period of 30 days, there shall be filed with the Clerk of this court a certificate from the Clerk of the Supreme Court in accordance with Rule 36 (2) of this Court's Rules, the stay shall continue until final disposition of these cases by the Supreme Court; and

3. The Honorable Francis L. Van Dusen is directed to stay further proceedings in these cases until further order of this Court.

By the Court,

Staley

Dated: December 26, 1962.

[fol. 113]

IN UNITED STATES COURT OF APPEALS

FOR THE THIRD CIRCUIT

No. 13,994

BARRACK, et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 13,997

POPKIN, et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 14,003

RAPP, Administrator, et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, et al.

No. 14,011

BIERNBAUM, et al., Executors, etc., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, et al.

[fol. 114]

No. 14,033

LAISTER, Executrix, etc., et al., petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, et al.

ORDER AMENDING OPINION

Present: Staley and Forman, Circuit Judges, and Lane, District Judge.

It is Ordered that the last paragraph on page 7 and concluding on page 8 of the opinion of this Court filed November 19, 1962, which reads:

> "What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the

Abate cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Subsequently, counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. Thus, with respect to these three suits, the district court's order of transfer was proper and will not be set aside."

be and it hereby is amended to read as follows:

What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an admin- [fol. 115] istrator. Thus, with respect to these suits the district court's order of transfer was proper and will not be set aside. Subsequently counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. With respect to these suits, therefore, we do not pass upon the question whether the district court's order of transfer was proper since it is not contested here.

By the Court,

Staley, Circuit Judge.

Dated: February 21, 1963.

[fol. 116]

SUPREME COURT OF THE UNITED STATES

No. 738—October Term, 1962

HONORABLE FRANCIS L. VAN DUSEN, Judge, etc., et al.,
Petitioners,

v.

ROBERTA BARRACK, Administratrix, etc., et al.

ORDER ALLOWING CERTIORARI—April 15, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 851 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

[fol. 117]

SUPREME COURT OF THE UNITED STATES

No. 851—October Term, 1962

FRANCIS L. VAN DUSEN, United States District Judge, Petitioners,

v.

ROBERTA BARRACK, Administratrix, etc., et al.

ORDER ALLOWING CERTIORARI—April 15, 1963

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted. The case is consolidated with No. 738 and a total of two hours is allotted for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Office-Supreme Court, U.S.
FILED
JAN 11 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

October Term, 1962

No. 56

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION and GENERAL MOTORS CORPORATION, *Petitioners,*

and

THE UNITED STATES OF AMERICA

v.

ROBERTA BARRACK, Admx., etc., et al.,
SIDNEY W. POPKIN, et al.,
HOWARD H. RAPP, Admr., etc., et al.,
LEAH BIERNBAUM, Extrs., etc., et al.,
DORIS A. LAISTER, Extrx., etc., et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No.

THE HONORABLE FRANCIS L. VAN DUSEN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION AND GENERAL MOTORS CORPORATION,

Petitioners,

and

THE UNITED STATES OF AMERICA,

v.

ROBERTA BARRACK, ADMX., ETC., ET AL.,
SIDNEY W. POPKIN, ET AL.,
HOWARD H. RAPP, ADMR., ETC., ET AL.,
LEAH BIERNBAUM, EXTRS., ETC., ET AL.,
DORIS A. LAISTER, EXTRX., ETC., ET AL.,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, The Honorable Francis L. Van Dusen, Eastern Air Lines, Inc., Lockheed Aircraft Corporation and General Motors Corporation pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW.

The Opinion of District Judge Van Dusen directing transfer of 45 civil actions from the Eastern District of Pennsylvania to the District of Massachusetts pursuant to Section 1404(a) of the Judicial Code is reported *sub nom. Popkin et al. v. Eastern Air Lines, Inc., et al.*, at 204 F. Supp. 426 (E. D. Pa. 1962) and is printed in Appendix A to this Petition. The Opinion of Circuit Judges Staley, Forman and District Judge Lane of the United States Court of Appeals for the Third Circuit directing that the order be vacated is not yet reported but is printed in Appendix B to this Petition.

JURISDICTION.

The Writ of Mandamus directing the District Court to vacate and set aside its order of transfer was issued on December 14, 1962 (Appendix C, p. 32a), in accordance with the Court's order entered on December 7, 1962 (Appendix C, p. 30a). The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

QUESTION PRESENTED.

Where 114 actions arising out of the accident here involved have been instituted in the District of Massachusetts where the accident occurred, that being the only district in which all requirements of venue and jurisdiction might have been met as to all defendants, and the District Court having determined that 45 wrongful death and personal injury actions instituted against four of the same defendants in Pennsylvania should be transferred to Massachusetts for the convenience of witnesses and in the interest of justice, does plaintiffs' failure in some of these wrongful death actions to apply for ancillary appointments as personal representatives in Massachusetts foreclose that district from being a district where these wrongful death actions "might have been brought" within the meaning of Section 1404(a) of the Judicial Code?

STATUTE INVOLVED.

Section 1404(a) of the Judicial Code, 28 U. S. C. § 1404(a), provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE.

On April 6, 1962, petitioner, The Honorable Francis L. Van Dusen, entered an order of transfer in accordance with Section 1404(a) of the Judicial Code, having found that transfer to the District of Massachusetts would be for the convenience of witnesses and in the interest of justice. This order directed transfer of 45 actions brought by respondents in the United States District Court for the Eastern District of Pennsylvania against petitioners, Eastern Air Lines, Inc., Lockheed Aircraft Corporation and General Motors Corporation and against the United States of America. Jurisdiction is based on diversity of citizenship and, as to the United States, on the Federal Tort Claims Act. The plaintiffs below, the present respondents, petitioned the Court of Appeals for the Third Circuit for Writs of Mandamus or Prohibition. The defendants were permitted to intervene in the Court of Appeals in opposition.

Since some of the personal representative plaintiffs had not applied for ancillary letters in Massachusetts, the Court of Appeals held that those wrongful death actions which were properly commenced in Pennsylvania might not originally have been brought in Massachusetts and therefore could not now be transferred to Massachusetts. The Court ruled, however, that the order was proper as to the three wrongful death actions in which venue was improper in

the Eastern District of Pennsylvania. In two of these three actions, plaintiffs had not applied for Massachusetts appointments, but the Court nevertheless said that these two cases must be transferred to Massachusetts (Appendix B, p. 29a). Apparently, it concluded that Massachusetts was a district in which the actions "could have been brought" under Section 1406(a), although it was not a district in which they "might have been brought" under Section 1404(a).

The circumstances giving rise to this decision, which virtually nullifies the provisions of one of the principal transfer statutes and threatens to curtail the application of the other, are as follows:

On October 4, 1960, a Lockheed Electra aircraft operated by Eastern Air Lines, Inc. crashed into Boston Harbor shortly after take-off. As a result, one hundred and fourteen separate suits are now pending in the Massachusetts District Court; and in the Eastern District of Pennsylvania, forty wrongful death and five personal injury actions.[1] Eastern, Lockheed, General Motors and the United States are defendants in both courts. In some of the Massachusetts suits, the Massachusetts Port Authority is also a defendant. The three corporations which are defendants in Pennsylvania are subject to suit in both districts. However, due to the venue provisions of the Federal Tort Claims Act and the location of the Massachusetts Port Authority, Massachusetts is the only district in which all of these actions might be maintained against all five defendants.

Motions to transfer to the District of Massachusetts each of the forty-five Pennsylvania suits were filed by defendants pursuant to Section 1404(a) of the Judicial Code. Following extensive oral argument and careful consideration of the briefs, affidavits and other matters submitted by the parties, Judge Van Dusen on April 6, 1962 filed an

1. A number of plaintiffs in both courts instituted separate suits against one or more of the defendants.

opinion and entered an order granting the motions, having found that such a transfer would be for the convenience of witnesses and in the interest of justice.

Judge Van Dusen found, inter alia, that the District of Massachusetts will be more convenient for the presently known witnesses on the issues of liability; that consolidation of the actions pending in Pennsylvania with those in Massachusetts for purposes of proceedings before trial is likely to produce more fair and orderly trials for all litigants and to save needless time and expense to the public, including jurors, and other litigants whose cases are awaiting trial; and that consolidation of all these cases will result in the conduct of fewer trials on the issues of liability, thereby avoiding the economic waste involved in duplicating litigation and the risk of inconsistent results as to liability (Appendix A, pp. 4a-12a, 18a-19a).

In issuing the writ the Court of Appeals did not dispute these findings. It held only that Section 1404(a) did not authorize such a transfer where plaintiffs did not have a right to sue without ancillary appointment in Massachusetts even though the Court conceded it was "quite likely" that they would have been appointed had application been made (Appendix B, p. 28a). In resolving this issue against transfer, the Court of Appeals relied on this Court's opinion in *Hoffman v. Blaski*, 363 U. S. 335 (1960) (Appendix B, pp. 26a-27a). The District Court had resolved the issue in favor of transfer relying on this Court's later decision in *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19 (1960) (Appendix A, p. 21a).

REASONS FOR ALLOWING THE WRIT.

I. The Decision Below Nullifies an Important Federal Procedural Statute in Disaster, Death and Other Litigation Involving Fiduciaries as Parties.

Section 1404(a) was enacted by Congress to reduce "wastefulness of time, energy and money", and "to protect litigants, witnesses and the public against unnecessary inconvenience and expense" arising from duplicating litigation in multiple districts. *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19, 26, 27 (1960). The reasons expressed by the District Court for the transfer of these cases serve precisely this design. The Court of Appeals held that this design could not be given effect in these cases because of wholly unrelated matters of state law and of a supposed state policy. Contrary to the intention of Congress, this decision renders Section 1404(a) unavailable in large classes of cases in which the convenience of parties, witnesses and the interest of justice may well be served by transfer as in the cases at bar.

The provisions of Section 1404(a) are particularly important to the administration of the federal courts in wrongful death and related litigation arising from disasters such as mass-transportation accidents and explosions. In this type of litigation, of which the cases at bar are excellent examples, the facts determinative of liability in all claims must be established by substantially the same witnesses, even though some of the claims may be for death, others for personal injury, and still others for property loss. In such cases, vast economies can be effected in judicial time and effort as well as in that of numerous members of the public serving as witnesses, jurors and advisors to the litigants by consolidating the cases in one district for pre-trial procedures and for the trial of liability issues.

The ruling of the Court of Appeals renders the provisions of Section 1404(a) virtually inapplicable to this class of case where its availability is most important. Under this ruling, potential transferee districts are limited to those few jurisdictions located in the seven states which permit a foreign fiduciary to obtain judgment in wrongful death actions by virtue of his foreign appointment.[2] Of the remaining forty-four of the fifty-one jurisdictions, twenty-three require the foreign fiduciary to obtain ancillary appointment in connection with suits under the state's wrongful death act,[3] nineteen require other affirmative pre-

2. Arizona, Ariz. Rev. Stat. Ann. § 12-612 (1956); Delaware, Del. Code Ann. tit. 12, § 1561 (1953); Iowa, *Gross v. Hocker*, 243 Iowa 291, 51 N. W. 2d 466 (1952); Michigan, *Siverling v. Lee*, 90 F. Supp. 659 (D. C. Mich. 1950); *Cardor v. Marhoff*, 143 F. Supp. 920 (D. C. Mich. 1956); Missouri, *Demattei v. Missouri-Kan. Tex. R. R.*, 345 Mo. 1136, 139 S. W. 2d 504 (1940); New Mexico, *Henkel v. Hood*, 49 N. M. 45, 1956 P. 2d 790 (1945); Wisconsin, *Robertson v. Chicago, St. P. M. & O. R. R.*, 122 Wisc. 66, 99 N. W. 1135 (1904).

3. Alaska, Alaska Comp. Laws Ann. § 61-3-2 (Supp. 1958); California, Cal. Civ. Prac. Code § 1913; Prob. Code §§ 360, 362, 400, 405, 407, 420 (1956); Connecticut, Conn. Gen. Stat. Ann. § 52-21; § 45-208 (1960); Hawaii, Hawaii Rev. Laws § 317-9 (1955); Idaho, Idaho Code Ann. § 15-220, 222, 317 (1948); Kentucky, Ky. Rev. Stat. § 394.150, § 395.005 (1955); Maine, Me. Rev. Stat. Ann. Ch. 154, §§ 14, 15, 17, 62 (1954); Maryland, Md. Ann. Code art. 93, §§ 45, 57, 368 (1957); Massachusetts, Mass. Gen. Laws Ann. ch. 191, § 5; ch. 192, §§ 4, 5, 9, 11 (1955); Montana, Mont. Rev. Code Ann. §-91-1001 (Supp. 1961); § 91-1002, 1301, 1302, 1405 (1949); Nevada, Nev. Rev. Stat. § 136.260, § 138.020, § 139.010 (1961); North Carolina, N. C. Gen. Stat. § 28-8 (1950); § 28-186 (Supp. 1961); § 31-23, 27 (1950); Oregon, Ore. Rev. Stat. § 115.160, 190, 410 (1961); Rhode Island, R. I. Gen. Laws Ann. § 33-7-18, 21; § 33-8-7; § 33-18-9 (1957); South Carolina, S. C. Code § 19-281 (1952); § 19-591 (Supp. 1962); Tennessee, Tenn. Code Ann. § 30-105, 106; 32-501 (1955); 35-610 (Supp. 1960); Texas, Tex. Prob. Code §§ 78, 95, 105 (1956); Utah, Utah Code Ann. § 75-3-22, 23, 24; 75-3-15; 75-4-4 (1953); Vermont, Vt. Stat. tit. 4, ch. 313; tit. 14, ch. 902 (1958); tit. 14, ch. 904 (Supp. 1961); Virginia, Va. Code Ann. § 26-59 (Supp. 1960); § 64-88 (1949); Washington, Wash. Rev. Code § 11.20.090, § 11.28.010; § 11.36.010 (1951); West Virginia, W. Va. Code ch. 41, art. 5, § 4073; ch. 44, art. 5, § 4207 (1961); Wyoming, Wyo. Stat. Ann. § 2-52, 68, 95, 106 (1959).

liminary acts, such as filing of foreign letters, appointing a resident agent for service of process and filing bond,[4] and two [illegible] not permit suit in the name of the fiduciary.[5] Of the same fifty-one jurisdictions, only one permits the foreign fiduciary to obtain a judgment by virtue of his foreign appointment in actions other than for wrongful death,[6] thirty require the foreign fiduciary to obtain ancillary appointment,[7] and twenty require other affirmative preliminary acts such as filing of foreign letters, appointing a resident agent for service of process and filing bond.[8]

4. Alabama, Ala. Code tit. 61, § 151 (1960); Arkansas, Ark. Stat. § 27-805 (repl. vol. 1962); District of Columbia, D. C. Code Ann. § 20-504, 505 (1961); Florida, Fla. Stat. § 734.30 (Supp. 1961); Georgia, Ga. Code § 113-2401, 2402, 2403, 2405 (1933); Illinois, Ill. Rev. Stat. ch. 3, § 265.416 (1961); Indiana, Ind. Ann. Stat. § 7-752 (repl. vol. 1953); Kansas, Kan. Gen. Stat. Ann. § 59-1707, 1708 (1949); Minnesota, Minn. Stat. § 573.05 (1947); Mississippi, Miss. Code Ann. § 622 (1957); Nebraska, Neb. Rev. Stat. § 30-303, 807 (1956); New Hampshire, N. H. Rev. Stat. Ann. § 553:14 (1955); *Ghilain v. Couture*, 84 N. H. 48, 146 Atl. 395 (1929); New Jersey, N. J. Rev. Stat. § 3A:12-7 (1953); New York, N. Y. Surr. Ct. Act. §§ 159, 167 (1953), § 160 (Supp. 1961); North Dakota, N. D. Rev. Code § 30-11-03, 19; § 30-24-18 (1960); Ohio, Ohio Rev. Code Ann. § 2109.04; § 2113.75 (1954); Oklahoma, Okla. Stat. tit. 58, § 262, § 171-88 (1937); Pennsylvania, Pa. Stat. tit. 20, § 320.1101 (Supp. 1961); South Dakota, S. D. Code § 35.0902 (Supp. 1960).

5. Colorado, Col. Rev. Stat. Ann. § 41-1-1, 2 (1953); Louisiana, La. Civ. Code Ann. art. 2315 (West Supp. 1961).

6. Delaware, Del. Code Ann. tit. 12, § 1561 (1953).

7. In addition to those jurisdictions referred to in footnote 3, *supra*, the following States require the foreign fiduciary to obtain ancillary appointment in actions other than for wrongful death; Arizona, Ariz. Rev. Stat. Ann. § 14-341, 342 (1956); Iowa, Iowa Code § 633.33, 34, 45, 50 (1950); Louisiana, La. Code Civ. Proc. Ann. arts. 3081, 3097 (West 1961); La. Civ. Code Ann. art. 1596 (West 1952); La. Rev. Stat. Ann. § 9:2401, 2421, 2422, 2423 (1951); Michigan, Mich. Stat. Ann. § 27.3178 (98), (100), (278) (1943); Missouri, Mo. Rev. Stat. § 473.117, 667; § 474.380 (1956); New Hampshire, N. H. Rev. Stat. Ann. § 551:5; § 553:5; §554:28 (1955); New Mexico, N. M. Stat. Ann. § 31-1-4, 5, 6; § 312-1 (1954).

8. The jurisdictions requiring other affirmative preliminary acts in actions other than for wrongful death are the same as those referred

Thus the extent to which Section 1404(a) would be circumscribed by the ruling of the court below is readily apparent.

The practical effect of the ruling is not limited to death claims in the usual context of disaster litigation. Although the ruling raises no bar to the transfer of other claims, the advantages to be derived from their consolidation with other suits pending in the transferee district will no longer be available since the death cases must in any event remain in the inconvenient transferor district. Thus in the present cases, for example, the Court of Appeals has urged the District Court to reconsider its order transferring the personal injury claims, in view of the Court's ruling with respect to the death cases (Appendix B, p. 29a).

The Court's ruling is equally restrictive of transfer in any case in which other fiduciaries are parties because the appointment of any fiduciary generally has no effect outside the jurisdiction making the appointment.

The increased cost of litigation which the Court's ruling will create will be borne not only by large corporations, but by individuals as well, such as those involved in accidents of automobiles or private aircraft. It will also be borne by the United States, which, under the Federal Tort Claims Act, may be sued in any state in which the plaintiff resides. The savings to be effected by consolidating duplicating litigation in one district is particularly important to it as a litigant. Perhaps of greatest public importance will be the inability of district judges, as a result of the Court's ruling, to utilize Section 1404(a) to alleviate the burdens on the federal judicial system which duplicating litigation needlessly imposes.

There is no reason discernible in federal policy for barring transfer of these types of litigation to convenient forums. By Section 1404(a) Congress merely restricted transfer to a district in which the action "might have been

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to in footnote 4, *supra*, with the following changes: add, Colorado, Col. Rev. Stat. Ann. § 152-6-7, 8 (1953) and Wisconsin, Wisc. Stat. § 287.16 (1958); delete, New Hampshire.

brought". The use of this language indicates that Congress intended only that the requirements of venue and jurisdiction be met in the transferee district because Congress used similar language in designating the District of Massachusetts as a district in which this type of litigation may be brought under the venue provisions of the Judicial Code (28 U. S. C. § 1391(a), (c) and § 1402(b)). Indeed, most federal venue statutes contain the phrase "may be brought" in defining the districts in which venue is proper.[9] Since these actions "may be brought" in Massachusetts, it is plain that they "might have been brought" there under Section 1404(a).

Instead of interpreting the "might have been brought" requirement in accordance with the Acts of Congress designating the districts in which litigation of this type may be brought, the Court has limited transferee districts in representative suits to those made possible by the few state legislatures which have authorized a foreign personal representative to sue without obtaining ancillary appointment or otherwise complying with local law. Although the Court recognized that its ruling would curtail the application of Section 1404(a), it said it could not presume that Congress intended to alter state policy by permitting transfer of representative suits to federal courts sitting in those states which do not permit a personal representative to bring suit by virtue of a foreign appointment. By this ruling, state legislatures become the arbiters of the extent to which Acts of Congress governing procedure in federal district courts are effective. The ruling permits state fiduciary law to provide a shelter for litigation in costly and inconvenient forums and to prevent the utilization of the statutory procedure provided by Congress to test plaintiff's choice of forum.

The decision, however, actually fails to serve state policy. The policy of Massachusetts in particular discloses liberality in permitting a foreign personal representative

9. See, *e.g.*, 28 U. S. C. §§ 1391(a) and (b), 1392, 1393(b), 1395(d), 1396, 1397, 1399, 1400(b).

who has brought suit in Massachusetts to obtain an ancillary appointment in Massachusetts and to amend his complaint even after the statute of limitations has run. *Boudreau v. New England Transportation Company*, 315 Mass. 423, 53 N. E. 2d 92 (1944). It therefore can hardly be said that the policy of that state is to foreclose its courts to foreign personal representatives merely because they failed to apply for ancillary appointment prior to the institution of suit.

The reasoning of the Court in concluding that no transfer can be made under Section 1404(a) may be equally restrictive of transfer under Section 1406(a). It provides as follows:

> "The district court of a district in which is filed a a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such a case to any district or division in which it *could have been brought*." (Emphasis supplied.)

Since transfer is authorized only to districts in which the action "could have been brought," personal representatives who institute suit in a jurisdiction in which they mistakenly believe the defendant to be subject to suit will, under logical application of the Court's ruling, have their suit dismissed rather than transferred to a proper district. If the requirement that the actions "might have been brought" in the transferee district is not met, it is plain that the actions "could" not have been brought there. Such a dismissal, rather than transfer, would be directly contrary to the result which Congress intended in enacting Section 1406(a). *Goldlawr, Inc. v. Heiman*, 369 U. S. 463 (1962). The Court of Appeals, however, failed to apply its own logic, in that it permitted transfer of two of these cases, where venue was improper and plaintiffs had not applied for ancillary letters in Massachusetts, even though under its own reasoning they could not have been brought in Massachusetts.

The Court of Appeals' interpretation of the "might have been brought" requirement nullifies the provisions of 1404(a) in death and disaster litigation and threatens to

curtail the application of 1406(a). The Court of Appeals has reached this result by subordinating the federal policy of transfer to state law and a supposed state policy. This Court should therefore review the decision of the court below.

II. The Decision Below Misconstrues and Conflicts in Principle With Applicable Decisions of This Court.

In holding that the District Court was not empowered by Section 1404(a) to transfer the wrongful death actions to the District of Massachusetts, the Court of Appeals declared that this Court's decision in *Hoffman v. Blaski*, 363 U. S. 335 (1960) "compels the conclusion that respondent was without power to transfer these actions" (Appendix B, p. 26a). But contrary to the decision below, it is plain that *Hoffman v. Blaski* contains no justification for such a result. In fact, the Court's opinion conflicts in principle with that decision and with other decisions of this Court.

This Court consistently has rejected restrictive constructions of transfer statutes, based upon irrelevant or inapplicable legal principles, which would frustrate the procedural reforms desired by Congress. In *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19 (1960), libellant attempted to avoid transfer by invoking admiralty concepts relating to actions *in rem*. His suit was brought both *in rem* against the barge and *in personam* against the barge owner. This Court held that the action "might have been brought" in the transferee district, notwithstanding the fact that plaintiff would have been unable to commence suit *in rem* against the vessel in the transferee district. In so holding, this Court said that a common sense interpretation of Section 1404(a) was necessary because the interpretation urged by plaintiff "would practically scuttle the *forum non conveniens* statute so far as admiralty actions are concerned." 364 U. S. 19 at 24. This Court noted that it had not hesitated in the past to refuse to apply this technical distinction "in a way which would cut down,

as it would here, the scope of congressional enactments" (364 U. S. 19 at 23-24), and said that Section 1404(a) "should not be made ambiguous by the importation of irrelevant fictions". 364 U. S. 19 at 26.

The same position was taken by this Court in interpreting Section 1406(a) in *Goldlawr, Inc. v. Heiman*, 369 U. S. 463 (1962). There it was urged that traditional conceptions of personal jurisdiction barred transfer. This Court held that this body of law was irrelevant to the congressional purpose to permit transfer where plaintiff had filed suit in a jurisdiction in which defendant may raise technical objections to suit. The Court said:

> "It would at least partially frustrate this enlightened congressional objective to import ambiguities into § 1406(a) which do not exist in the language Congress used to achieve the procedural reform it desired." 369 U. S. 463, 467.

The ruling of the Court of Appeals squarely conflicts with the broad principle of these cases. Instead of being guided by the language and the purpose of Section 1404(a), it has engrafted on it a restriction arising from state law pertaining to fiduciaries and administration of estates which is wholly irrelevant to the reforms which Congress intended.

These actions "might have been brought" in Massachusetts in any sense which Congress may have intended. Since venue would have been properly laid and personal jurisdiction could have been acquired over each of the defendants in Massachusetts, the requirements of the statute and of *Hoffman v. Blaski*, 363 U. S. 335 (1960), are plainly satisfied. That decision holds only that the statute bars transfer when "the defendant legally could not have been subjected to suit there at the time when the case was originally filed." *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19, 22 (1960).

In addition, since Massachusetts courts admittedly would have entertained claims for the wrongful death of plaintiffs' decedents, it is immaterial whether or not they would have been enforceable in Massachusetts by the present plaintiffs as opposed to some other fiduciary duly qualified in Massachusetts. The statute does not require that these wrongful death claims be enforceable in the transferee district by the same nominal plaintiffs who brought suit in the transferor district. Indeed, there is no reason for such a requirement. Under Massachusetts law, wrongful death claims are enforceable only by personal representatives who are nominal parties having no interest in the damages recoverable. Further, in *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19, 26 (1960), this Court said:

> "The idea behind § 1404(a) is that where a 'civil action' to vindicate a wrong—*however brought in a court*—presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole action to the more convenient court." (Emphasis supplied.)

But even if the statute can be construed to require that the actions be brought in Massachusetts by the same nominal plaintiffs who instituted suit in Pennsylvania, it was well within their power to proceed in Massachusetts had they desired to do so. All that would have been required was the presentation of a petition for administration in compliance with routine formalities [10] either before or after suit was instituted.[11] The panel acknowledged that "it is quite likely" that such appointments could have been obtained. The best evidence of this is that plaintiffs in

10. Mass. Gen. Laws Ann., Chapters 193, 194 and 195, § 8.

11. If done after the institution of suit, the complaint could be amended to aver capacity even after the statute of limitations has run. *Boudreau v. New England Transportation Company*, 315 Mass. 423, 53 N. E. 2d 92 (1944).

three of the Pennsylvania death actions,[12] who are citizens of Pennsylvania with Pennsylvania domiciliary appointments, did obtain ancillary appointments in Massachusetts. They brought suits in that district against three of the defendants,[13] having brought suit against the fourth, Eastern Air Lines, Inc., in the Eastern District of Pennsylvania.

The Court's decision also conflicts with the principle that Section 1404(a) should not be so interpreted as to give one party a greater right of forum selection than the other. In *Hoffman v. Blaski*, 363 U. S. 335 (1960), this Court held that a district in which venue and personal jurisdiction were lacking was not a district in which the action "might have been brought." This Court observed that to hold otherwise would be inequitable and discriminatory in that a defendant could obtain transfer to a district in which plaintiff could not have proceeded in the first instance without defendant's consent. 363 U. S. 335; 344. Similarly, in *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19 (1960), one of the reasons advanced for rejecting the restrictive interpretation urged was that its

12. *Doris A. Laister, as Executrix of the Estate of Chester H. Laister, Deceased v. Eastern Air Lines, Inc.*, Civil Action No. 29724; *Selma Birenbaum, Abe Birenbaum and Abram P. Piwosky, as Executors of the Estate of Martin Birenbaum, Deceased v. Eastern Air Lines, Inc.*, Civil Action No. 30288; *Sylvia Barrack, as the widow of Morris Barrack, Deceased, and the First Pennsylvania Banking & Trust Company, as Executor of the Estate of Morris Barrack, Deceased v. Eastern Air Lines, Inc.*, Civil Action No. 30289.

13. *Doris A. Laister, as Executrix and as Special Administratrix of the Estate of Chester H. Laister, deceased v. Lockheed Aircraft Corporation, General Motors Corporation, Massachusetts Port Authority and United States of America*, No. 61-766-J; *Selma Birenbaum, Abe Birenbaum and Abram P. Piwosky, as Executors and Special Administrator of the Estate of Martin Birenbaum, deceased v. Lockheed Aircraft Corporation, General Motors Corporation, Massachusetts Port Authority, and United States of America*, No. 61-764-J; *Sylvia Barrack, as Special Administratrix and Administratrix with the Will Annexed of the Estate of Morris Barrack, deceased v. Lockheed Aircraft Corporation, General Motors Corporation, Massachusetts Port Authority and United States of America*, No. 61-763-J.

adoption would be "conducive to a race of diligence among litigants for a trial in the District Court each prefers" (364 U. S. 19, 26).

The decision of the court below gives those interested in the enforcement of a wrongful death claim an absolute choice of forum among those in which they might institute suit, and limits defendant to the one forum selected. This choice may be exercised by having an appropriate person appointed only in the jurisdiction selected and by having him bring suit there. Although there may be many districts in which jurisdiction might have been obtained over the defendant, in which venue would have been proper and in which the wrongful death claim might have been enforced, under the Court's ruling the action cannot be transferred to any of them because the nominal plaintiff thus selected had not applied for an appointment in the transferee district.

In the present cases plaintiffs have a choice of at least two forums. Under the Court's ruling, defendants are at the mercy of the plaintiffs' choice despite the provisions of Section 1404(a) and despite the principle of *Hoffman v. Blaski*, 363 U. S. 335 (1960) that Section 1404(a) may not be interpreted so as to give one party a greater choice of forums than the other.

CONCLUSION.

These cases should be reviewed by this Court because the Court's interpretation of the "might have been brought" requirement vitally affects the administration of the federal courts. It nullifies the provisions of Section 1404(a) in wrongful death and disaster litigation where its provisions are most needed and threatens to curtail the application of another important transfer statute. The Court's interpretation of Section 1404(a) conflicts in principle with the decisions of this Court and thwarts federal policy by importing rules of estate and fiduciary law which

are irrelevant to the congressional purpose. Contrary to the decisions of this Court, the ruling gives personal representative plaintiffs a choice of districts in which their actions may be brought, while defendants are restricted as a matter of law to whatever district such plaintiffs may choose. This result has been achieved by the Court's reliance on state law and supposed state policy. In view of the importance of Section 1404(a) to the administration of the federal courts, the decision of the Court of Appeals should be reviewed by this Court.

For the reasons set forth above, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX A.

OPINION OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA.

(Filed April 6, 1962.)

VAN DUSEN, *District Judge.*

These 55 cases,[1] involving fatal and, as to three plaintiffs, non-fatal injuries suffered when an Electra airplane manufactured by Lockheed, having engines made by General Motors, and owned and operated by Eastern, crashed approximately one minute after take-off in Boston Harbor on October 4, 1960, are before the court on Motions to Transfer under 28 U. S. C. A. § 1404(a). There are 114 similar cases pending in the United States District Court for the District of Massachusetts (see Document No. 30 in C. A. 30078). The record in these cases (see, particularly, statements of Lee S. Kreindler, Esq. at the argument) indicates that the primary basis for liability on which the plaintiffs presently rely is alleged fault of the defendants resulting in bird ingestion by the turbo-prop engines of the plane involved in this suit, as well as in engines of other

1. There are 28 plaintiffs involved in these 55 cases, since 13 plaintiffs have filed two suits in this court and 7 plaintiffs have filed three cases in this court resulting from the injuries received in the October 4, 1960, airplane accident at Boston, Mass. Only one of the 114 cases in the Massachusetts District Court is an admiralty action, whereas 7 of these cases are suits in admiralty brought by the same parties who have also filed Civil Actions in this court.

Wherever "plaintiff" is used, it includes libellants and wherever "defendants" is used it includes respondents.

One of these cases has already been transferred due to improper venue (C. A. 30307).

planes using the Logan International Airport, Boston, at about the time of the accident.

In Jurgelis v. Southern Motors Express, 169 F. Supp. 345 (E. D. Pa. 1959), this court said:

"In Norwood v. Kirkpatrick, 1955, 349 U. S. 29, 75 S. Ct. 544, 99 L. Ed. 789, the Supreme Court, in discussing the relation of 28 U. S. C. A. § 1404(a) to the doctrine of forum non conveniens as recognized by the Supreme Court in Gulf Oil Corp. v. Gilbert, 1946, 330 U. S. 501, 67 S. Ct. 839, 91 L. Ed. 1055, said at page 32 of 349 U. S. [29], at page 546 of 75 S. Ct. [545]:

"'* * *, we believe that Congress, by the term "for the convenience of parties and witnesses, in the interest of justice," intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader.'

"It appears, therefore, that under the present state of the law, the factors to be considered by a court in determining whether or not to transfer the action under § 1404(a) are established by the Gulf Oil Corp. case,[2]

2. In the Gulf Oil Corp. v. Gilbert case, supra, the court said at pp. 508-509 of 330 U. S., at p. 843 of 67 S. Ct.:

"* * * An interest to be considered, and the one likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex,' 'harass,' or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the

and the degree of discretion to be exercised by the court is established by the Norwood case."

The last sentence quoted above was approved by Chief Judge Biggs, sitting specially in this court, in Medich v. American Oil Company, 177 F. Supp. 682, 683 (E. D. Pa. 1959). See also, All States Freight v. Modarelli, 196 F. 2d 1010 (3rd Cir., 1952), where the court said at page 1011:

> "The statute limits the privilege of the plaintiffs to have his lawsuit tried in the forum of his choosing if he can there get jurisdiction over the defendant. The purpose of the limitation is clearly to make the inevitably uncomfortable (for the litigant) judicial process cheaper and more convenient and, if possible, more prompt."

After consideration of the record in these cases, the undersigned has concluded that transfer is required under 28 U. S. C. A. § 1404(a), as follows:

I. *Convenience of the Parties*

In this case, plaintiffs claim their convenience would be served by a trial in this District and the defendants claim that it would be more convenient for them to

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balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

"Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not to be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

have these cases tried in the District of Massachusetts.[3] The burden on the survivor-plaintiffs of presenting their damage testimony in the transferee District has not been overlooked, but this is a burden often falling upon persons who, having elected to travel away from home, are involved in accidents and must have been considered by Congress in enacting 28 U. S. C. A. § 1404(a).[4] None of the affidavits allege that any of the plaintiffs is impecunious, nor is their financial condition stated in the record.

II. *Convenience of Witnesses.*

The record makes clear that the District of Massachusetts will be more convenient for the presently known witnesses on the issues of liability and of degree of culpability of the defendants.[4] The Collins Affidavit (Document No.

3. There is nothing in 28 U. S. C. A. § 1404(a) which precludes transfer because the plaintiff is a resident of the transferor District. See, for example, Norwood v. Atlantic Coast Line R. R. Co., C. A. 15810, p. 4 of opinion of then Chief Judge (now Senior Judge) Kirkpatrick dated 7/12/54, petition for writ of mandamus and prohibition denied (3rd Cir., No. 11,364, on 7/16/54), aff'd. sub nom. Norwood v. Kirkpatrick, 349 U. S. 29, 75 S. Ct. 544, 99 L. Ed. 789 (1955); Harry Winston, Inc. v. Zale Jewelry Company, 191 F. Supp. 686 (S. D. N. Y. 1961); Huff v. Nashville, Chattanooga & St. Louis Ry., 88 F. Supp. 735 (S. D. N. Y. 1949). As stated in Brown v. Woodring, 174 F. Supp. 640, 645 (M. D. Pa. 1959):

"'Defendant's mandatory margin for victory * * * need not be an overwhelming one.' A court should not hesitate to disturb plaintiff's choice of forum if the three statutory factors dictate transfer."

4. The Massachusetts Death Act, in relevant part, provides:

"A person who (1) by his negligence causes the death of a person * * *, or (2) by wilful, wanton or reckless act causes death of a person * * *, or (3) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his wilful, wanton or reckless act causes the death of a passenger * * *, shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability * * *. A person shall be liable for the negligence or the wilful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act, except that the

31 in C. A. 28664) alleges that (a) all but six of the 47 eye witnesses to the accident known to General Motors reside in the District of Massachusetts and within 25 miles of Boston (par. 12);[5] (b) four of ten survivors of the crash reside in the District of Massachusetts and within 60 miles of the center of Boston;[6] (c) four employees of the Logan Airport who prepared the plane for flight reside in the vicinity of Boston; (d) seven operators of the control tower at Logan International Airport, who were eye witnesses to the aircraft's flight and crash and who would know the time of the take-off and crash, reside within 25 miles of center city Boston (see par. 15 of Document No. 31 in C. A. 28664); (e) all but one of the six experts who first examined the bodies of the dead birds reside within twelve miles of center city Boston and the sixth such expert resides in New Hampshire, approximately 60 miles from Boston (see par. 17 of Document No. 31 in C. A. 28664); and (f) five other potential witnesses having knowledge of the presence of birds at the airport, and some of whom discovered dead birds at the airport, reside within 25 miles of Boston (see pars. 16 and 18 of Document No. 31 in C. A. 28664).[7] Also,

damages shall be assessed with reference to the degree of culpability of his agents or servants." Mass. Ann. Laws, c. 229, § 2 (Suppl. 1961).

5. The second sentence of this paragraph states: "These witnesses observed the takeoff, flight and crash of the aircraft and would be able to testify to its flight path, describe the nature of its flight and crash and furnish testimony relevant to the time interval between takeoff and crash."

6. In par. 13 of this Affidavit, it is alleged that these witnesses would be able to testify as to the course of the plane's flight, the sound of its engines, and the results of the crash. In par. 4 of the unsworn answer to the Motions to Transfer filed by plaintiffs in Civil Actions Nos. 28664, 29881, 29882, 29883, 29884, 29901, 30300, 30307 and 30344 and Nos. 321, 323, 325, 327, 329, 335 and 337 of 1961 in Admiralty, it is alleged that Major Sylvester Koenig resides in Greenville, S. C. (Document No. 35 in C. A. 28664), rather than Falmouth, Mass., as alleged in this paragraph 13, but the residence of this survivor of the crash is not stated in any affidavit filed by plaintiffs.

7. The Wickenhaver Affidavit lists some of the same witnesses as those referred to above in the Collins Affidavit. See Exhibit B to

it is clear that it will be more convenient for such witnesses if there is to be one trial, rather than several, and if the discovery can be conducted under the supervision of one court.[8] Cf. MacAlister v. Guterma, 263 F. 2d 65, 68-70 (2nd Cir., 1958).

Plaintiffs have not filed any affidavits contradicting the above sworn allegations, but have emphasized, generally, without listing any additional specific witnesses in their affidavits (except for six individuals listed without specifying the area of their testimony in Document No. 35 in C. A. 28741 and five individuals listed as damage witnesses for one plaintiff in Document No. 29 in C. A. 30078), that most of their compensatory damage witnesses come from this district or near it.[9] Experience in this and other Districts indicates that, once the issues of liability have been determined, relatively few of a large group of cases such as these, resulting from one accident, go to trial on the damage issues. Furthermore, as indicated below, there are several legal hurdles the personal representative plaintiffs have to overcome before compensatory damages become pertinent in their cases.[10]

Document No. 30 in C. A. 28664. In par. 8 of that Affidavit, there is named an additional witness as to the birds living in the transferee District (John J. Phelan, of Winthrop, Mass.).

8. Since the United States of America is one of the defendants, the only District in which all the actions can be consolidated for trial is Massachusetts. See 28 U. S. C. A. § 1402(b), providing that the United States may only be sued "where the plaintiff resides or wherein the act or omission complained of occurred."

9. For example, the McConnell Affidavit (Document No. 29 in C. A. 30078) lists six compensatory damage witnesses that plaintiff Ward wishes to call "from this area" and does not deny that he was also hospitalized in the Boston area or that medical witnesses from that area could present helpful evidence on the issue of damages—see, also, Affidavits attached to Document No. 35 in C. A. 28664 and Documents Nos. 34 and 35 in C. A. 28741.

10. If agreement on damages cannot be secured in the cases against the Government, it is most probable that the Government would agree to a determination of the damage issues by this court.

Some plaintiffs also stated in their affidavits that they seek to establish that the accident occurred as the result of negligent design and testing of the engines by General Motors, negligent design and testing of the aircraft by Lockheed, negligent testing of the aircraft, as well as negligent training and physical examinations of the flight personnel, by Eastern, and negligence of the Government in execution of its responsibility for flight safety. See par. 8 of Document No. 29 in C. A. 30078. At the argument, it was admitted that plaintiffs hoped that the Government agency investigating the crash would be able to show faulty design and testing of the aircraft and its engines, but no definite finding to this effect has been made over 18 months after the crash. Hence, there is nothing specific on the record to show that any large number of witnesses from outside the Boston area, and for whom the transferor District would be more convenient than the transferee District, will be required for the trial of the above-mentioned issues of liability and degree of culpability. Employees of the defendants from California and Indiana, referred to at page 10 of the Kreindler Affidavit, being Document No. 12 in C. A. 29724, would not be substantially inconvenienced any more by a trial in Philadelphia than one in Boston,[11] but it is clear that they will be inconvenienced by having to testify at trials in both places, as opposed to one trial in Boston (see footnote 8 above, showing that the transferee District is the only place where there can be a single trial). Employees of the Civil Aeronautics Board, Bureau of Safety, will similarly have to testify in the District of Massachusetts in any event and, if the transfer of these 55 cases is denied, they will have to attend another trial in this District.

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11. A trial in this District would be less convenient for defendants since it would require them to transport their employees to testify at least twice from the west or mid-west to the eastern part of this country.

III. *The Interest of Justice.*

The interest of justice requires the transfer of these cases to the transferee District for these reasons, among others:[8]

(1) Consolidation of all the cases arising from this accident for purposes of proceedings before trial is likely to procure fairer and more orderly trials for all litigants and save needless time and expense for the public, including jurors, and other litigants whose cases are awaiting trial.

See MacAlister v. Guterma, supra, 263 F. 2d at 68-70; O'Donnell v. Watson Bros. Transportation Company, 183 F. Supp. 577 (N. D. Ill. 1960); and cases cited in those cases. With reference to the argument in the attached letter of January 11, 1962 (based on a letter from the Clerk of the Massachusetts District dated January 9, 1962, which is also attached), that "there is nothing to be gained administratively by the transfer of these matters to Boston," the United States District Court for the District of Massachusetts has informed the undersigned that all the cases arising out of this accident have been assigned to one judge, who is handling all such cases for purposes of proceedings prior to trial and will consider possibilities of severance of issues for trial, as well as consolidation for trial, at the appropriate time.[12] As pointed out in Kelly v. Greer, 295 F. 2d 18, 21 (3rd Cir., 1961), even after a consolidation order has been entered, it "does not freeze the future conduct of the litigation."

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8. See note 8 on Page 6a.

12. Paragraph 8 of the Lockwood Affidavit (Document No. 30 in C. A. 30078) refers to the normal progress of a case in the United States District Court for the District of Massachusetts, whereas the court has informed the undersigned that this case is being treated as a protracted case and not "in the normal course." See Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F. R. D. 351 (1960).

(2) The conduct of as few trials as feasible on the issues of liability and culpability.

The purpose of the Federal Rules of Civil Procedure was to encourage consolidation wherever this was fair and possible. See Sutcliffe Storage & Warehouse Co. v. United States, 162 F. 2d 849, 851 (1st Cir., 1947); United States v. Knauer, 149 F. 2d 519 (7th Cir., 1945), aff'd 328 U. S. 654, 66 S. Ct. 1304, 90 L. Ed. 1500 (1946); cf. Walker v. Loop Fish & Oyster Co., 211 F. 2d 777, 780-781 (5th Cir., 1954); Howey v. Yellow Cab Co., 181 F. 2d 967, 973 (3rd Cir., 1950), aff'd sub nom. United States v. Yellow Cab Co., 340 U. S. 543, 71 S. Ct. 399, 95 L. Ed. 523 (1951). In the Howey case, supra, the court said at page 973:

> "Surely the stricture of the Sherwood case * * *, would not serve to require second, separate trials with the United States as the sole defendant, the issue being one of contribution, for such second, separate trials would embrace the same evidence as that already received and would be conducted before the same judge."

Federal trial courts have consistently recognized the fairness and desirability of consolidating cases for trial, particularly on the issue of liability. See Weitort v. A. H. Bull & Company, 192 F. Supp. 165 (E. D. Pa. 1961); Hassett v. Modern Maid Packers, Inc., 23 F. R. D. 661 (D. Md. 1959); Polak v. Koninklijke Luchtvaart Maatschappij, etc., 19 F. R. D. 87 (S. D. N. Y. 1956); and cases cited in those cases. In the Polak case, supra, the court said at page 88:

> "The advantages of consolidating multiple claims arising from a single accident outweigh even the considerations requiring strict enforcement of the rules on jury demand. * * * (Citing case.) Recent experience with the trial of such consolidated claims in this court indicates that almost invariably the only evidence peculiar to each claim is that relating to damages. Most

of the trial court's time is consumed by the trial issues common to all of the cases. Considerations of expense as well as the convenience of witnesses, litigants and the Court, and the expeditious dispatch of judicial business, impel consolidation under such circumstances."

In the Hassett case, supra, involving five actions arising out of one accident, the court said at page 664 of 23 F. R. D.:

> "* * * It will save time for parties, witnesses, counsel and courts, to have the entire matter disposed of at one trial. * * *
>
> "The five cases should be consolidated for trial under Rule 42(a), but, as permitted by Rule 42(b), the jury shall first hear the evidence on the issue of liability and decide that issue for all of the cases."

It is neither fair nor just that there should be a different liability result for some of these plaintiffs than there is for others. Transfers under 28 U. S. C. A. § 1404(a) have resulted from the desirability of consolidating the transferred cases for trial with other similar cases pending in the transferee District. See A/S Dampskibsselskabet Svendbord v. United States, 116 F. Supp. 603 (E. D. Tex. 1953), where the court said at page 606:

> "However, a more important consideration, it would seem, is that all of the facts and circumstances necessary to determine the rights of the parties will have to be presented both there and here at different times, and it is possible that the two Courts could reach conflicting conclusions; whereas if the case filed here is transferred, it can be consolidated with those in the Southern District of New York and all rights determined in a single trial without the possibility of such a conflict."

See, also, Continental Grain Co. v. Barge FBL-585, 364 U. S. 19, 21, 80 S. Ct. 1470, 4 L. Ed. 2d 1540 (1960); Cressman v. United Air Lines, 158 F. Supp. 404 (S. D. N. Y. 1958); Winsor v. United Air Lines, 153 F. Supp. 244 (E. D. N. Y. 1957).

Recently, the United States Court of Appeals for the Second Circuit has emphasized the desirability of consolidation of separate actions involving common questions of law and fact for purposes of pre-trial and trial under the supervision of one judge or master. See MacAlister v. Guterma, supra. In Crosley Corporation v. Hazeltine Corporation, 122 F. 2d 925 (3rd Cir., 1941), the United States Court of Appeals for the Third Circuit said at page 930:

> "It is of obvious importance to all the litigants to have a single determination of their controversy, rather than several decisions which if they conflict may require separate appeals to different circuit courts of appeals. No party has a vested right to have his cause tried by one judge rather than by another of equal jurisdiction. • • • The economic waste involved in duplicating litigation is obvious. Equally important is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us to seek actively to avoid the waste of judicial time and energy. Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties."

(3) The District of Massachusetts is the only federal jurisdiction where all defendants can be served.

The defendants (particularly the United States of America and Eastern Air Lines, Inc.) emphasized at the

argument that they wish to join the Massachusetts Port Authority (owner and operator of the Boston airport) as a third-party defendant and service can only be obtained on that entity in the District of Massachusetts (see page 4 of Kreindler Affidavit, Document No. 12 in C. A. 29724). This court has consistently recognized that the ability to join a third-party defendant in the transferee forum is a consideration in favor of transfer. See Allied Petro Products Incorporated, etc. v. Maryland Casualty Company, E. D. Pa., 201 F. Supp. 694, and cases cited at pages 695, 696. The unfairness which can result from different results in separate trials of actions arising from the same accident is illustrated in cases such as Curtis v. A. Garcia Y. Cia, 272 F. 2d 235 (3rd Cir., 1959), where differing records in two trials produced a liability result for defendant and third-party defendant which it is quite possible that neither fact finder would have reached if both actions had been considered at the same trial.

(4) Other reasons favoring transfer of the ca[illegible] in the interest of justice.

In addition to the above factors favoring the transferee District as the only place where fair proceedings before trial and a fair trial for all parties on the issues of liability and culpability may be had, the following factors mentioned by the United States Supreme Court in Gulf Oil Corp. v. Gilbert (see second paragraph quoted in footnote 2, supra) favor trial in the transferee District:

(a) The litigation will be handled "at its origin," rather than in this court, the docket of which is more congested than that of the transferee District (see par. 7 of Wickenhaver Affidavit, being Exhibit B to Document No. 31).

(b) The trial of the issues of liability and culpability will be held "in a forum that is at home with the state law."

One of the principal arguments of the personal representative plaintiffs who oppose the transfer is that they will be deprived of the benefits of the public policy embodied in the Pennsylvania Constitution (particularly Article I, Section 11, and Article III, Section 21, P. S.) if these cases are transferred. Cf. § 612 of Restatement of Conflicts of Law. This argument against transfer is rejected for these reasons, among others:

A. There is no reason to believe that a Federal Judge, sitting in Massachusetts, will not be just as able in selecting and interpreting the applicable law as such a judge sitting in Pennsylvania will be.

The Supreme Court of the United States has recently stated: "The general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of injury to the substantive rights of the parties." Richards v. United States, 369 U. S. 1, 82 S. Ct. 585 (1962).[13] In view of the possibility that the decision in the cases pending in the Pennsylvania State Courts referred to under B below may make moot the argument against application of the above-quoted rule in this case, it is not necessary to decide at this time such questions argued by counsel as the application to this situation of §§ 384, 391 (comment d), 412, 517 and 612 of the Restatement, Conflict of Laws, and as, when a case is transferred under 28 U. S. C. A. § 1404 (a), does the transferee court determine the rights of the parties on the basis of the law that would have been applied in the District where the suit was originally filed. See Hendrick v. Atchison, T. & S. F. Ry. Co., 182 F. 2d 305, 309-310 (10th Cir., 1950); Gomez v. The SS. Dorothy, 183 F.

13. It is noted that in referring to the rule of some states "to take into account the interests of the State having significant contact with the parties to the litigation," the court did not refer to any Pennsylvania or Massachusetts cases in footnote 26 of its opinion (see page 12 of 369 U. S., page 592 of 82 S. Ct.).

Supp. 499, 512 (D. Puerto Rico 1959); Hargrove v. Louisville & Nashville Railroad Company, 153 F. Supp. 681, 684 (W. D. Ky. 1957); Greve v. Gibraltar Enterprises, 85 F. Supp. 410, 414 (D. New Mex. 1949);[14] and authorities cited in those cases. The transferee court will be better able to pass on these questions, if necessary, after decision of the cases pending in the Pennsylvania State Courts mentioned in footnote 20 below.

B. Contention that Pennsylvania public policy prevents enforcement of the measure of recovery, but accepts the right of action provided in the Massachusetts Wrongful Death Act should not be ruled upon at this time.

Relying on (1) a recent dictum of four out of seven justices of the New York Court of Appeals in Kilberg v. Northeast Air Lines, Inc., 9 N. Y. 2d 34, 211 N. Y. S. 2d 133, 172 N. E. 2d 526 (1961), to support the application of Article 3, § 21, of the Pennsylvania Constitution,[15] (2) an

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14. In this case, the court used this language at page 414 of 85 F. Supp.:

"It appears the rule should be that the legal rights of the parties are determined by the law of the state or district in which the cause originates. In other words, a change of venue affects the place of trial only."

15. Article 3, § 21, provides:

"* * * in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."

Article 1, § 16, of the New York Constitution, relied on in the Kilberg case, supra, provides: "The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitations." It is noted that in view of the reasoning used to support the majority's dictum in the Kilberg case, the same result might not be applicable to defendants such as Lockheed and General Motors, which are not common carriers who sold tickets in the forum to domiciliaries or residents of the forum.

older Pennsylvania Supreme Court case [Thirteenth & Fifteenth St. Passenger Railway Co. v. Boudrou, 92 Pa. 475, 481-482 (1880)] to support the application of Article 1, § 11, of the Pennsylvania Constitution,[16] and (3) general language in Pennsylvania cases that foreign penal statutes will not be enforced in Pennsylvania courts,[17] the personal representative plaintiffs contend that they are entitled to recover compensatory damages without limit in these actions because of the alleged, strong Pennsylvania public policy opposed to the $20,000. limit in the Massachusetts Wrongful Death Act. Defendants argue that neither the Pennsylvania appellate court nor the Federal decisions have applied such a public policy to invalidate such foreign state limitations on recovery in the past. See, for example, Slater v. Mexican National R. R. Co., 194 U. S. 120, 24 S. Ct. 581, 48 L. Ed. 900 (1904); Knecht v. United States, 242 F. 2d 929 (3rd Cir., 1957); Rennekamp v. Blair, 375 Pa. 620, 101 A. 2d 669 (1954); cf. Hughes v. Pennsylvania Railroad Co., 202 Pa. 222, 228-229, 51 A. 990, 63 L. R. A. 513 (1902); and Quaker Worsted Mills Corp. v. Howard Truck

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16. Article 1, § 11, of this Constitution provides:

"All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

17. Nesbitt v. Clark, 272 Pa. 161, 116 A. 404, 25 A. L. R. 1406 (1922); Commercial Nat. Bank v. Kirk, 222 Pa. 567, 71 A. 1085 (1909). Although language in Massachusetts Bonding & Ins. Co. v. United States, 352 U. S. 128, 132, 77 S. Ct. 186, 1 L. Ed. 2d 189 (1956), is relied on to establish that the Massachusetts Wrongful Death Act is penal, the Pennsylvania appellate courts have recognized that the words "penal" and "penalty" have different shades of meaning. See Commonwealth v. Musser Forests, Inc., 394 Pa. 205, 146 A. 2d 714 (1958); Laughlin et al. v. Baltalden, Inc., 191 Pa. Super. 611, 617-618, 159 A. 2d 26 (1960); cf. Ward v. Rice, 29 F. Supp. 714 (E. D. Pa. 1939). The Pennsylvania appellate courts have also recognized that there is a strong public policy in enforcing rights and duties validly created by foreign law. See Personal Finance Co. of New York v. General Finance Co., 133 Pa. Super. 582, 585-586, 3 A. 2d 174 (1938).

ing Corp., 131 Pa. Super. 1, 8-9, 198 A. 691 (1938).[18] Also, defendants contend that the full faith and credit clause requires Pennsylvania courts to follow all the terms of the Massachusetts Wrongful Death Act, relying on First Nat. Bank of Chicago v. United Air Lines, 342 U. S. 396, 400-401, 72 S. Ct. 421, 96 L. Ed. 441 (1952); Order of United Commercial Travelers v. Wolfe, 331 U. S. 586, 67 S. Ct. 1355, 91 L. Ed. 1687 (1947); Bradford Electric Co. v. Clapper, 286 U. S. 145, 160, 52 S. Ct. 571, 76 L. Ed. 1026 (1932). Finally, defendants argue that if this Massachusetts Act may not be applied in these cases, there can be no recovery at all, since the plaintiffs have no remedy.

However, in accordance with the repeated statements of the Supreme Court of the United States that District Courts should abstain from deciding issues involving the Constitution and public policy of a state so as to afford the state courts a reasonable opportunity to decide such matters,[19] the determination of the law governing the measure

18. In the Hughes case, the court used this language at pp. 228-229 of 202 Pa., at p. 992 of 51 A.:

"Where a contract containing a stipulation limiting liability for negligence is made in one state, but with a view to its performance by transportation through or into one or more other states, we see no reason why it should not be construed in accordance with the law of the state where its negligent breach, causing injury, occurs. If such a contract comes under construction in a state like Pennsylvania, whose policy prohibits such exemption, and the injury has occurred in a state where the contract is valid, the stipulation will be enforced, as in Forepaugh v. Railroad Co., [128 Pa. 217, 18 A. 503, 5 L. R. A. 508] and in Fairchild v. Railroad Co., [148 Pa. 527, 24 A. 79]. But if the injury has taken place within its limits, it will declare the contract null and void, as in Burnett v. Railroad Co., [176 Pa. 45, 34 A. 972]. In the Fairchild Case, as the injury occurred in Maryland, this court enforced the law of that state. If the injury to the horse had been delayed until in the course of the journey it had reached Pennsylvania, our own law of public policy would have controlled."

This approach seems different than the New York law, as exemplified in the Conklin case, relied on in the majority opinion in Kilberg at page 135 of 211 N. Y. S. 2d, at page 528 of 172 N. E. 2d.

19. See Harrison v. N. A. A. C. P., 360 U. S. 167, 176-178, 79 S. Ct. 1025, 3 L. Ed. 2d 1152 (1959); Louisiana Power & Light Co. v. Thibodaux City, 360 U. S. 25, 79 S. Ct. 1070, 3 L. Ed. 2d 1058

of damages in these actions should be postponed until the trial on the issues of liability and culpability has been completed. Meanwhile, a Pennsylvania appellate court decision may become available to enlighten us on the public policy of this Commonwealth in this situation, since there are two cases pending in the state courts in which there will be an opportunity for the foregoing contention to be submitted to the Pennsylvania courts.[20]

Abstention of decision on this aspect of the case at this time will also prevent a premature decision on the Constitutional issue of the application of the full faith and credit clause.[21] Cf. Railroad Commission of Texas v.

(1959); and cases cited in Note, "Abstention: An Exercise in Federalism," 108 U. of Pa. Law Rev. 2226 (1959). In the Thibodaux case, the court said at page 27, 79 S. Ct. at page 1072: "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law." In the Harrison case, the court said at page 176 of 360 U. S., at page 1029 of 79 S. Ct.:

"This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments * * * should at all times actuate the federal courts,' Matthews v. Rodgers, 284 U. S. 521, 525, [52 S. Ct. 217, 219, 76 L. Ed. 477] as their 'contribution * * * in furthering the harmonious relation between state and federal authority. * * *'"

20. It is noted that two actions previously pending in this court (C. A. Nos. 30390 and 30391) have been remanded to the state court and are now pending there (Court of Common Pleas No. 4 of Philadelphia County, Sept. Term 1961, No. 237, and Court of Common Pleas No. 6 of Philadelphia County, Sept. Term 1961, No. 238).

21. Also, it is noted that the application of the Full Faith & Credit Clause (article 4, § 1) to the dictum of the majority in the Kilberg case is raised by an appeal now pending in the United States Court of Appeals for the Second Circuit from Pearson, etc. v. Northeast Airlines, Inc., 201 F. Supp. 45, in the U. S. District Court for the Southern District of New York, Opinion and Order filed 11/15/61. Counsel have informed the court that the New York District Court reached a contrary decision to Pearson, supra, in Trauth v. Northeast Airlines, Inc., (S. D. N. Y., C. A. 149-256,

Pullman Co., 312 U. S. 496, 501, 61 S. Ct. 643, 85 L. Ed. 971 (1941).

Finally, it should be noted that the considerations stated in 28 U. S. C. A. § 1404(a) require the transfer of the actions brought against the Government for these reasons, among others:

(a) The basis of the claims against the Government makes it only fair that it be permitted to bring in as a third-party defendant the Massachusetts Port Authority, as operator of the airport.

(b) The District of Massachusetts is the only District where all the suits against the Government may be brought (see footnote 8 above);

(c) The Massachusetts Federal Court is most familiar with "the whole law of the State where the act or omission occurred" which must be applied in the suits against the Government, see Richards v. United States, supra, at page 1 of 369 U. S., at page 585 of 82 S. Ct.; and

(d) There is no contention that the above-mentioned public policy contained in the Pennsylvania Constitution applies to these Government suits, which are not governed by the measure of damages in the Massachusetts Wrongful Death Act.

The many factors dictating transfer of the cases against the Government (19) [22] must be considered as a factor

1961), where a New Jersey citizen was plaintiff, on the ground that New Jersey's policy differed from that of New York. An excerpt from the transcript of the court's statements in Trauth, supra, is appended to the attached letter of 1/9/62 from counsel for General Motors.

22. Civil Actions Nos. 28764, 28788, 28789, 29100, 29161, 29162, 29275, 29616, 29901, 30230, 30257, 30258, 30263, 30302, 30303, 30304, 30305, 30306 and 30343.

favoring transfer of the other cases pending in this District, so that all cases arising from this accident may be treated uniformly by the court which must dispose of the great majority of such cases.

Plaintiffs in C. A. 30078, C. A. 30346 and C. A. 30284 contend that these wrongful death actions may not be transferred under 28 U. S. C. A. § 1404(a) since they were not appointed as personal representatives in Massachusetts and, hence, could not have brought the actions there,[23] relying on Hoffman v. Blaski, 363 U. S. 335, 80 S. Ct. 1084, 4 L. Ed. 2d 1254 (1960). However, the Supreme Judicial Court of Massachusetts has held that a foreign personal representative may bring a suit under the wrongful death act and later qualify in the forum,[24] even though the Statute of Limitations has run at the time of such later qualification,[25] in Boudreau v. New England Transportation Company, 315 Mass. 423, 426-427, 53 N. E. 2d 92, 94, where the court said:

> "Even apart from any admission under G. L. (Ter. Ed.) c. 231, § 30, this is not a case where there was no plaintiff in existence when the action was brought. The plaintiff was a live person in whatever capacity she was acting or purporting to act. The question was whether she had the capacity to maintain the action. She could assert that she had and could bring the action and try the issue of her competency to maintain it. The action was therefore not a mere nullity but was from the first a genuine lawsuit and an adequate basis for an amendment alleging an appointment in the State of the forum when such appointment was secured."

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23. See Boutillier v. Wesinger, 322 Mass. 495, 496, 78 N. E. 2d 195 (1948).

24. See Mass. Gen. Laws, Ch. 193, §§ 1 & 2, Ch. 194, § 5, Ch. 195, § 8, Mass. Ann. Laws, Ch. 204, § 3.

25. Cf. Brennan v. Rooney, 139 F. Supp. 484, 486-487 (E. D. Pa. 1956).

Although this is a close question, this contention of plaintiffs is rejected for these reasons:

A. The District of Massachusetts is a District where Congress designated litigation of this type might be brought.

The appropriate Congressional Title of the United States Code (Title 28 covering "Judiciary and Judicial Procedure") provides in Chapter 85 (District Courts; Jurisdiction) at Section 1332(a) and in Chapter 87 (District Courts; Venue) at Sections 1391(a) and (c) and 1402(b) for institution of these actions in the District of Massachusetts.

In determining where a suit might have been brought, the dissenting opinion in Paramount Pictures v. Rodney, 186 F. 2d 111, 116 (3rd Cir. 1951), which was quoted with approval in Hoffman v. Blaski, supra, 363 U. S. at 343, 80 S. Ct. at 1089, states:

> "The district judge * * * had to decide whether the Northern District of Texas was a place where the suits 'might have been brought.' A reasonable and obvious way of determining this was to see whether Congress in some other statute had designated the places where litigation of this sort might be brought.
>
> * * *
>
> "This background suggests that proper venue in more than one forum is the limiting context of the Code revision and that within this context Section 1404(a) substitutes a broad power of transfer for a more restricted pre-existing power of dismissal. Plaintiffs are prevented from abusing their normal privilege of choice among districts of proper venue. At the same time, courts are directed to respect the legislative enumeration of places which Congress has deemed appropriate for the trial of various types of litigation." (pp. 116 and 118)

B. A "common-sense approach" in interpreting Section 1404(a) of Title 28 to accomplish its purposes requires a construction that these cases "might have been brought" in the District of Massachusetts. See Continental Grain Co. v. Barge FBL-585, supra.

For the reasons stated above, it is "in the interest of justice" and "for the convenience of * * * witnesses" that these actions be transferred to the District of Massachusetts. Under such circumstances, legal fictions such as the state which has authorized a personal representative to act should not be a basis for rejecting the use of 28 U. S. C. A. § 1404(a). See Continental Grain Co. v. Barge FBL-585, supra, 364 U. S. at 22-24, 80 S. Ct. at 1472, 1473. In distinguishing Hoffman v. Blaski, supra, the court said at page 22 of 364 U. S., at page 1472 of 80 S. Ct. of the Barge FBL-585 case:

> "Those cases involved transfers in which the plaintiffs filing the suits would have had no right whatever to proceed originally against the defendants on the 'civil actions' in the District Courts to which transfer was sought without the defendants' consent. But in this case there was admittedly a right on the part of the grain company to subject the owner of the barge, with or without its consent, to a 'civil action' in Memphis at the time the New Orleans action was brought."

In applying 28 U. S. C. A. § 1404(a), courts do not consider all the defenses which might have been, or be, raised in the transferee forum and decide whether an action might have been successfully brought there.[26] See Greve v. Gibraltar Enterprises, supra, 85 F. Supp. at 412-413; cf. Ackert v. Pelt Bryan, 299 F. 2d 65 (2nd Cir. 1962).

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26. It is noted that "It is not necessary to aver the capacity of a party to sue or * * * the authority of a party to sue * * * in a representative capacity * * *" but such matters must be raised "by specific negative averment * * *." See F. R. Civ. P. 9(a), 28 U. S. C. A.

The defendants, by requesting these transfers, will be estopped from objecting to the capacity of the personal representative plaintiffs to proceed in these actions. See Greve v. Gibraltar Enterprises, supra, 85 F. Supp. at 414.[27]

27. There are attached to this opinion letters from counsel dated January 9, January 11, January 12 and February 14 with enclosures (including copy of letter of January 9, 1962, from the Clerk of the U. S. District Court for the District of Massachusetts, which was enclosed with the letter of January 11).

APPENDIX B.

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

(Filed November 19, 1962.)

Before STALEY and FORMAN, *Circuit Judges*, and LANE, *District Judge*.

By STALEY, *Circuit Judge*.

Petitioners seek writs of mandamus or prohibition directing respondent to vacate and set aside his order transferring these actions to the United States District Court for the District of Massachusetts. The order was entered pursuant to § 1404(a) of 28 U. S. C.,[1] but has been stayed pending the disposition of these petitions.

The actions arise out of the crash of an Eastern Air Lines Electra airplane in Boston Harbor on October 4, 1960. These suits were filed in the District Court for the Eastern District of Pennsylvania by two survivors of the crash and by the personal representatives of several deceased passengers. Named as defendants were Eastern Air Lines, Inc., Lockheed Aircraft Corp., General Motors Corp., and in several instances, the United States. On April 6, 1962, respondent entered an order granting defendants' motions for transfer pursuant to an opinion filed that same day.[2]

With respect to the death actions, petitioners assert that respondent was without power to enter the order of transfer because the Massachusetts District Court is not a district where these actions "might have been brought" within the meaning of § 1404(a). Additionally, they argue

1. "§ 1404. Change of venue

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U. S. C. § 1404(a) (1958 ed.).

2. The opinion is reported at 204 F. Supp. 426.

that because the transferee forum may apply a different rule of substantive law to these suits,[3] the order should be vacated as a matter of law. Lastly, they contend that the order constitutes a clear abuse of discretion. Because we hold that respondent did not have power to transfer these actions, we find it unnecessary to consider petitioners' alternative arguments.

At the outset, we are faced with defendant-intervenors' contention that the petitions for writs of mandamus or prohibition are inappropriate in these circumstances. It must be noted that respondent does not join in presenting this argument.

Our recent decision in Swindell-Dressler Corp. v. Dumbauld, — F. 2d — (C. A. 3, 1962), makes it abundantly clear that mandamus is appropriate when the question presented is whether the district court acted without jurisdiction in granting a motion to transfer under § 1404(a). However, intervenors urge that petitioners had an adequate remedy of appeal under the provisions of the Interlocutory Appeals Act, 28 U. S. C. A. § 1292(b).[4] But that very issue

3. The Massachusetts Death Act provides in relevant part:

"A person who (1) by his negligence causes the death of a person in the exercise of due care * * * shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability * * *." Mass. Ann. Laws, C. 229, § 2. It has been held to be punitive in nature. Massachusetts Bonding & Ins. Co. v. United States, 352 U. S. 128 (1956).

4. "§ 1292. Interlocutory decisions

* * *

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order * * *." 28 U. S. C. § 1292(b) (1958 ed.).

was squarely raised in *Swindell-Dressler* and was decided in the negative.[5] We, therefore, conclude that these petitions are properly before us.

On the merits, petitioners contend that because the personal representatives in the death actions have not obtained ancillary appointment in Massachusetts, they lack capacity to bring the actions in that state, and thus § 1404 (a) does not authorize transfer to that district. Initially, reference is made to Rule 17(b) of the Federal Rules of Civil Procedure, which provides in relevant part: "In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held * * *."

Next, petitioners point out that under the law of Massachusetts a personal representative appointed in another state is not thereby qualified to maintain suit in Massachusetts, Boutillier v. Wesinger, 322 Mass. 495, 78 N. E. 2d 195 (1948), and that appointment as an ancillary or special administrator is in the discretion of the Massachusetts probate judge, Mass. Ann. Laws, C. 193, § 10. Finally, the Supreme Court's decision in Hoffman v. Blaski, 363 U. S. 335 (1960), is cited as being dispositive of the issue before us.

In *Hoffman*, the district court in which suit had been properly brought transferred it to a district which did not have venue of the cause. The Supreme Court, affirming the judgment of the Seventh Circuit, held that this defect precluded transfer. The phrase "where it might have been

5. As we indicated in Milbert v. Bison Laboratories, Inc., 260 F. 2d 431, 433 (C. A. 3, 1958), a portion of the legislative history of § 1292(b) would appear to support intervenors' contention. However, as we there pointed out, the district judge's written statement in the order, conforming to the language of the statute, is an essential condition precedent before we may even entertain an application for permission to appeal. Here, respondent, being fully aware of the provisions of § 1292(b), failed to include such a statement in his order. Moreover, as heretofore indicated, he has expressly dissociated himself from intervenors' argument as to the availability of § 1292(b) and the propriety of mandamus.

brought" was construed as applying to the time when suit was originally instituted. With respect to the argument that the venue defect had been waived by the defendant's motion to transfer, the Court said, "But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff." 363 U. S. at pp. 343-344.

Respondent and intervenors would limit the holding in Hoffman v. Blaski, supra, to the requirement that the transferee forum have both venue and jurisdiction of the cause. They state that the existence of other potential defenses does not preclude removal, and cite several cases in which transfer has been effected although the suits would have been barred by the statute of limitations applicable in the transferee district.[6] Additionally, they argue that the phrase "the action" does not include the parties to the action.

We think that the holding in Hoffman v. Blaski, supra, compels the conclusion that respondent was without power to transfer these actions. The import of that decision is that unless the plaintiff *had an unqualified right to bring suit* in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a). Hence, the fact that at oral argument counsel for intervenors expressed a willingness to waive any objection to petitioners' capacity to sue in Massachusetts is

6. H. L. Green Co. v. McMahon, — F. 2d.— (C. A. 2, 1962); Headrick v. Atchison, T. & S. F. Ry., 182 F. 2d 305 (C. A. 10, 1950); Gomez v. S. S. Dorothy, 183 F. Supp. 499 (D. Puerto Rico, 1959); Crawford v. S. S. Shirley Lykes, 148 F. Supp. 958 (S. D. N. Y. 1957); Curry v. State Marine Corp. v. Delaware, 118 F. Supp. 234 (S. D. N. Y. 1954); Frechoux v. Lykes Bros. S. S. Co., 118 F. Supp. 234 (S. D. N. Y. 1953); Greve v. Gibralter Enterprises, 85 F. Supp. 410 (D. N. M. 1949). Six of these seven cases antedate Hoffman v. Blaski, supra. Moreover, the decisions in all seven were based upon the legal conclusion that the statute of limitations of the state of the transferor district would apply.

beside the point. Nor can the district court's statement that these actions involve the legal fiction of the appointment of a personal representative be used as a basis for distinguishing them from Hoffman v. Blaski, supra. Certainly, the requirement of capacity to sue is no more a legal fiction than is the necessity for having proper venue. Obviously, it, like venue, can be waived. Rules 9(a) and 12(h), Fed. R. Civ. P. But waiver or the possibility of waiver did not alter the Supreme Court's conclusion in *Hoffman*. In short, we can perceive no basis in either logic or policy for making any distinction between the absence of venue in the transferee forum and a prospective plaintiff's lack of capacity to sue there.

A similar conclusion was reached in Felchlin v. American Smelting and Refining Co., 136 F. Supp. 577 (S. D. Calif. 1955). There, suit was filed by California executors, and the defendant moved to dismiss or, in the alternative, to transfer the suit to the Western District of Texas. The court held that because Texas forbids suits by foreign executors, the proposed transferee forum was not a district "where the action might have been brought." Accordingly, the motion was denied.

Respondent and intervenors seek to distinguish *Felchlin* from the case at bar on the grounds that a suit by a foreign personal representative in Texas is a nullity, whereas in Massachusetts lack of capacity is a mere defense to the action and can be waived. However, we deem this distinction insubstantial, for whether lack of capacity precludes a prospective plaintiff from filing suit in the first instance, or subjects him to a dismissal at the instance of the defendant, the result is the same. In either case he does not have an unqualified right to sue.

The transfer sanctioned in Continental Grain Co. v. Barge FBL-585, 364 U. S. 19 (1960), is no help to respondent and intervenors, for that decision is premised on a fiction peculiar to the admiralty law.

The attempted differentiation between "the action" and the parties thereto is based on the language of Rules 13(h), 24, and 25(b) and (c) of the Federal Rules of Civil Procedure. We think it without merit. These rules refer to the addition, intervention, or substitution of parties to a law suit which has already been instituted. Thus, they necessarily make separate reference to the action and the parties to the action. More important, to say that the action and the parties thereto are separate and distinct is to ignore reality, for the identity of the parties is determinative of such basic matters as jurisdiction and venue.

The argument that petitioners could have brought these suits in Massachusetts, irrespective of the waiver of intervenors, by obtaining ancillary appointment misses the mark, for it ignores the fact that such appointment is discretionary with the probate court. Mass. Ann. Laws, C. 193, § 10. Of course, it is quite likely that most of these petitioners would have been so appointed. That, however, is immaterial, for the fact remains that here, as in *Hoffman*, petitioners did not have an independent right to maintain suit in Massachusetts.

Respondent and intervenors urge that the construction which petitioners seek would unduly circumscribe § 1404(a) in any action brought by a personal representative. The short answer to this is that by the use of the phrase "where it might have been brought" Congress intended that the power to transfer should not be unqualified. That most jurisdictions do not permit foreign personal representatives to bring suit in their courts as a matter of right is a well known rule of law, and we cannot presume that Congress intended to alter state policy to the extent of permitting transfer of such suits to the federal courts sitting in those states. Indeed, as we previously noted, Rule 17(b), Fed. R. Civ. P., requires the district court to refer to the law of the state in which it sits to determine capacity to sue. Finally, we must accept § 1404(a) as it has been construed by the Supreme Court in Hoffman v. Blaski, supra,

i.e., that it permits transfer only if the plaintiff at the time of the commencement of the action had an independent right to institute suit in the transferee district.

Of course, our holding that the district court was without jurisdiction to transfer these suits relates only to the death actions. However, in light of this opinion the district court may wish to reconsider the transfer of the two personal injury suits, particularly as the death actions, which constitute the great majority of these suits, will now be tried in the Eastern District of Pennsylvania.

What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Subsequently, counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. Thus, with respect to these three suits, the district court's order of transfer was proper and will not be set aside.

We assume that it will not be necessary to issue the writ unless a petition for certiorari is filed, and that the district court will vacate the order of transfer in accordance with this opinion.

APPENDIX C.

ORDER DATED DECEMBER 7, 1962.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,994

ROBERTA BARRACK, ADMX., ETC., ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13,997

SIDNEY W. POPKIN, ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,003

HOWARD H. RAPP, ADMR., ETC., ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN.

No. 14,011

LEAH BIERNBAUM, EXTRS., ETC., ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN.

No. 14,033

DORIS A. LAISTER, EXTRX., ETC., ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN.

Present: STALEY and FORMAN, *Circuit Judges,* and LANE, *District Judge.*

Upon consideration of the petitions for writs of mandamus or prohibition, of the answers by respondent and of the briefs, and after hearing:

It is ORDERED, ADJUDGED and DECREED by this Court that the prayers of the petitions be and the same hereby are granted and the Clerk of this Court is hereby directed to issue the writs of mandamus in accordance with the opinion of this Court.

By THE COURT,

STALEY,
Circuit Judge.

Dated:
December 7, 19

WRIT OF MANDAMUS ISSUED DECEMBER 14, 1962.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,994

BARRACK, ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13,997

POPKIN, ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN.

No. 14,003

RAPP, ADMINISTRATOR, ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN.

No. 14,011

BIERNBAUM, ET AL., EXECUTORS, ETC.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN.

No. 14,033

LAISTER, EXECUTRIX, ETC., ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN.

Peremptory Writ of Mandamus.

UNITED STATES OF AMERICA, THIRD JUDICIAL CIRCUIT *ss.:*

To the Honorable Francis L. Van Dusen, Judge of the United States District Court for the Eastern District of Pennsylvania, GREETINGS:

WHEREAS, the Honorable Francis L. Van Dusen by order filed April 6, 1962 transferred to the United States District Court for the District of Massachusetts Civil Actions brought against Eastern Air Lines, Inc., Lockheed Aircraft Corp., and General Motors Corporation and Civil Actions brought against the United States, a copy of which order is attached to this writ and marked Exhibit "A"; and

WHEREAS, the plaintiffs in the actions ordered to be transferred have filed petitions for writs of mandamus and prohibition directing the respondent to vacate and set aside his order of transfer; and

WHEREAS, the respondent has filed answers to the petitioners; and

WHEREAS, the matter came on to be heard before this Court on the aforesaid petitions, answers and briefs; and

WHEREAS, after due deliberation thereon this Court rendered its opinion November 19, 1962, that the Honorable Francis L. Van Dusen exceeded his authority when he

entered the order of transfer on April 6, 1962, with respect to the civil actions in the death cases; and

WHEREAS, on December 7, 1962 this Court caused to be entered herein its order, directing the Clerk of this Court to issue the writ of mandamus and prohibition in accordance with the opinion of the Court;

NOW, THEREFORE, THE RESPONDENT, THE HONORABLE FRANCIS L. VAN DUSEN IS HEREBY REQUIRED AND COMMANDED, immediately after the receipt of this writ, and without delay to vacate and set aside the order of April 6, 1962 in the civil actions enumerated in Exhibit "B" attached to this writ.

IDA O. CRESKOFF,
Clerk of the United States Court of Appeals for the Third Circuit.

Dated: December 14, 1962.

Exhibit "A"

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

SIDNEY W. POPKIN v. EASTERN AIR LINES, INC., and LOCKHEED AIRCRAFT CORP, and GENERAL MOTORS CORPORATION and succeeding cases captioned in the orders of 10/17/61 (Document No. 24 in C. A. 28664) and 11/1/61 (Document No. 7 in C. A. 29724), except Civil Actions Nos. 30257, 30259, 30307, 30390 and 30391 and all Admiralty Actions	CIVIL ACTIONS Nos. 28664 28741, 28762, 28763, 28764, 28788, 28789, 29099, 29100, 29159, 29160, 29161, 29162, 29274, 29275, 29615, 29616, 29724, 29768, 29881, 29882, 29883, 29884, 29901, 30078, 30079, 30200, 30230, 30258, 30260, 30263, 30266, 30284, 30288, 30289, 30300, 30301, 30302, 30303, 30304, 30305, 30306, 30343, 30344 and 30346

ORDER SUR MOTIONS TO TRANSFER

(Documents Nos. 28, 29 & 30 in C. A. 28664; Nos. 30, 31 & 32 in C. A. 28741; Nos. 23, 24 & 25 in C. A. 28762; Nos. 26, 27 & 28 in C. A. 28763; Nos. 13 & 15 in C. A. 28764; Nos. 13 and 15 in C. A. 28788; Nos. 13 & 15 in C. A. 28789; Nos. 22, 23 & 24 in C. A. 29099; Nos. 12 & 14 in C. A. 29100; Nos. 22, 23 & 24 in C. A. 29159; Nos. 22, 23 & 24 in C. A. 29160; Nos. 11 & 13 in C. A. 29161; Nos. 11 & 13 in C. A. 29162; Nos. 22, 23 & 24 in C. A. 29274; Nos. 12 & 14 in C. A. 29275; Nos. 20, 21 & 22 in C. A. 29615; Nos. 9 & 11 in C. A. 29616; No. 9 in C. A. 29724; Nos. 15, 16 & 17 in C. A. 29768; Nos. 15, 16 & 17 in C. A. 29881; Nos. 15, 16 & 17 in C. A. 29882; Nos. 15, 16 & 17 in C. A. 29883; Nos. 15, 16 & 17 in C. A. 29884; Nos. 8 & 11 in C. A. 29901; Nos. 21, 22 & 23 in C. A.

30078; Nos. 20, 21 & 22 in C. A. 30079; Nos. 11, 12 & 13 in C. A. 30200; No. 7 in C. A. 30230; No. 2 in C. A. 30258; Nos. 12, 13 & 14 in C. A. 30260; No. 2 in C. A. 30263; Nos. 9, 10 & 13 in C. A. 30266; Nos. 15, 16 17, & 24 in C. A. 30284; No. 6 in C. A. 30288; No. 6 in C. A. 30289; Nos. 13, 14 & 15 in C. A. 30300; Nos. 13, 14 & 15 in C. A. 30301; No. 11 in C. A. 30302; No. 4 in C. A. 30303; No. 2 in C. A. 30304; No. 11 in C. A. 30305; No. 2 in C. A. 30306; No. 12 in C. A. 30843; Nos. 13, 14 & 15 in C. A. 30344; Nos. 15, 16 & 17 in C. A. 30846)

AND NOW, April 6, 1962, IT IS ORDERED that the above-captioned cases are TRANSFERRED to the United States District Court for the District of Massachusetts pursuant to 28 U. S. C. A. § 1404(a).

/s/ Francis L. Van Dusen
J

CA. 30303

See Opinion filed earlier today.

CA 30304 The record indicates that this case should also be transferred due to improper venue in this District.

In this action, the Motion to Dismiss (Document No. 4) is being treated as an alternative Motion to Transfer in order to avoid precluding the plaintiff from recovering, and the District of Massachusetts is considered a more appropriate forum to which to transfer the case than the Middle District of Pennsylvania for the reasons stated in the above Opinion.

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Exhibit "B"

C. A. No. 28762

Barbara B. Meltzer, Admrx. of the Estate of
Allan J. Meltzer, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 28763

Henry C. Gransden, Admr. of the Estate of
Henry V. Gransden, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 28788

Barbara B. Meltzer, Admrx. of the Estate of
Allan J. Meltzer, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 28789

Henry C. Gransden, Admr. of the Estate of
Henry V. Gransden, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 29099

Lorraine Browndorf, Admrx. of the Estate of
Irving Browndorf, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29100

Lorraine Browndorf, Admrx. of the Estate of
Irving Browndorf, Deceased

v.

United States of Ameriea

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 29159

Elizabeth B. Schwartz, execx. estate
Theodore William Schwartz, deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29160

Ida G. Schwartz, execx. estate
Meyer A. Schwartz, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29161

Ida G. Schwartz, execx. estate
Meyer A. Schwartz, Deceased

v.

United States

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

C. A. No. 29162

Elizabeth B. Schwartz, execx. estate
Theodore William Schwartz, Deceased

v.

United States

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

C. A. No. 29274

Roberta Barrack, Admrx. of the Estate of
Jack M. Barrack, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29275

Roberta Barrack, Admrx. of the Estate of
Jack M. Barrack, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty deft.

C. A. No. 29615

J. Michael King and Berks County Trust Company, Executors of the Estate of Henry P. King, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29616

J. Michael King and Berks County Trust Company, Executors of the Estate of Henry P. King, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty. deft.

C. A. No. 29724

Doris A. Laister, as Execx. of the Estate of Chester H. Laister, deceased

v.

Eastern Air lines, Inc.

C. A. No. 29768

Leah Biernbaum and Dewey Hoffman, Executors of the Estate of Leonard Biernbaum, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29881

Edna E. Long and Laura Manney, Admrxs. of the Estate of Shirley E. Reitz, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29882

Mary B. Grice, Execx. of the Estate of
David S. Grice, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29883

Dorothy Weinstein, Execx. of the Estate of
Ralph Weinstein, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 29884

Diane Braff, Admrx. ad prosequendum and as
General Admrx. of the Estate of Bernard
Jay Braff, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30078

Howard H. Rapp, Admr. of the Estate of
Richard F. Zeller, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30200

Joyce J. Wright, Admrx. of the Estate of
John Allen Wright, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30230

Joyce J. Wright, Admrx. of the Estate of John Allen Wright, Deceased

v.

The United States of America

v.

Eastern Air Lines, Inc.

C. A. No. 30258

Ronald London, Admr. C. T. A. of the Estate of Phillip London, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

C. A. No. 30260

Ronald London, Admr. of the Estate of Philip London, deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30263

Ruth Staller, Admrx. of the Estate of Philip Staller, Deceased

v.

The United States of America

v.

Eastern Air Lines, Inc., 3rd-pty. deft.

C. A. No. 30266

Ruth Staller, Admrx. of the Estate of
Philip Staller, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30284

Nancy A. Frankenfield, Admrx. of the Estate
of George B. Frankenfield, Jr., Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30288

Selma Birenbaum, Abe Birenbaum and Abram P.
Piowsky as Executors of the Estate of
Martin Birenbanm, deceased

v.

Eastern Air Lines, Inc.

C. A. No. 30289

Sylvia Barrack as the widow of Morris
Barrack, deceased and the First Pennsylvania
Bank and Trust Company, as Executors of the
Estate of Morris Barrack, deceased

v.

Eastern Air Lines, Inc.

C. A. No. 30301

Thelma P. Freeman and Provident Tradesmens Bank and Trust Company, Co-Executors of the Estate of Addison B. Freeman, Jr., Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30302

Mary B. Grice, Execx. of the Estate of David S. Grice, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty. deft.

C. A. No. 30305

Dorothy Weinstein, Execx. of the Estate of Ralph Weinstein, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty. deft.

C. A. No. 30306

Thelma P. Freeman and Provident Tradesmens Bank and Trust Company, co-executors of the Estate of Addison B. Freeman, Jr., Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., 3d pty. deft.

C. A. No. 30343

Joseph Thompson, Jr., Admr. of the Estate of Letha Mae Thompson, Deceased

v.

United States of America

v.

Eastern Air Lines, Inc., Third Pty. Deft.

C. A. No. 30344

Joseph Thompson, Jr., admr. of the Estate of Letha Mae Thompson, Deceased

v.

Eastern Air Lines, Inc., et al.

C. A. No. 30346

Donald A. Scott, Admr. of the Estate of Thomas L. Moody, Deceased

v.

Eastern Air Lines, Inc., et al.

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In the Supreme Court of the United States.

OCTOBER TERM, 1962

No. ——

FRANCIS L. VAN DUSEN, UNITED STATES DISTRICT JUDGE, ET AL., PETITIONERS

v.

ROBERTA BARRACK, ADMINISTRATRIX, ETC., ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

The Solicitor General, for the United States and on behalf of the Honorable Francis L. Van Dusen, United States District Judge for the Eastern District of Pennsylvania, petitions for a writ of certiorari to review an order of the United States Court of Appeals for the Third Circuit, entered on December 7, 1962, directing that a writ of mandamus issue, and to review the peremptory writ of mandamus issued by that court on December 14, 1962.[1]

[1] A separate petition for a writ of certiorari (No. 738, this Term), seeking review of the same judgment of the court of appeals, has already been filed by General Motors Corporation, Eastern Air Lines, Inc., and Lockheed Aircraft Corporation, who, like the United States, were defendants-intervenors below.

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (Appendix *infra*, p. 1a) is reported *sub nom. Popkin* v. *Eastern Air Lines, Inc.*, at 204 F. Supp. 426. The opinion of the court of appeals (App., *infra*, p. 26a) is reported at 309 F. 2d 953.

JURISDICTION

On December 7, 1962, the court of appeals, pursuant to its opinion of November 19, 1962 (App., *infra*, p. 26a), ordered the issuance of a writ of mandamus (App., *infra*, p. 35a). On December 14, 1962, the clerk of that court issued the peremptory writ of mandamus (App., *infra*, p. 37a), which was subsequently stayed pending review in this Court (App., *infra*, p. 40a). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Section 1404(a) of the Judicial Code authorizes the transfer of a civil action to a more convenient district "where it might have been brought." Does a district court have the power to order such a transfer of a personal injury or wrongful death suit, brought by a decedent's personal representative, to another district in a State in which the plaintiff has failed to obtain ancillary appointment as a personal representative?[2]

---

[2] If this petition is granted, the government reserves the right to argue on its own behalf (as it did below) that mandamus was improperly issued here by the court of appeals

STATUTE INVOLVED

Section 1404(a) of the Judicial Code, 28 U.S.C. 1404(a), provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought.

STATEMENT

These actions arise out of the crash of a commercial airliner into Boston Harbor on October 4, 1960. As a result of the crash, 114 personal injury and wrongful death actions were commenced in the United States District Court for the District of Massachusetts (App., *infra*, p. 2a). The additional 45 actions here in controversy were commenced in the United States District Court for the Eastern District of Pennsylvania. In both courts suit was instituted, either jointly or separately, against Eastern Air Lines, Inc. (which operated the aircraft), Lockheed Aircraft Corporation (manufacturer of the aircraft), General Motors Corporation (manufacturer of the

---

because plaintiffs had failed to utilize the procedure prescribed by the Interlocutory Appeals Act, 28 U.S.C. 1292(b). It would seem that that Act, rather than the extraordinary writ of mandamus, furnishes a more appropriate basis for appellate review of transfer orders, particularly where such review is sought on the ground that the transferee court is not one in which the action "might have been brought." See H. Rep. No. 1667, 85th Cong., 2d Sess., pp. 1–2; see also testimony of late Chief Judge Parker, Hearings on H.R. 6238 before Subcommittee No. 3 of the House Committee on the Judiciary, 85th Cong., 2d Sess., pp. 8–9; *Deepwater Exploration Co.* v. *Andrew Weir Ins. Co.*, 167 F. Supp. 185, 187–188 (E.D. La.)

aircraft's engines) and the United States, on the basis of allegations that, because of negligence on the part of the defendants, the aircraft's engines ingested some birds in flight, causing it to crash. In some of the Massachusetts actions, the Massachusetts Port Authority (operator of the Boston airport) is an additional defendant. Jurisdiction with respect to the United States is based on the Federal Tort Claims Act.

The defendants in the Pennsylvania actions moved to transfer those cases to the Massachusetts court under 28 U.S.C. 1404(a), on the ground that such transfer is required by "the convenience of parties and witnesses" and that it would be "in the interest of justice." The plaintiffs resisted the transfer, some of them on the ground (among others) that, since they had instituted their suits as personal representatives appointed in Pennsylvania but had not qualified in Massachusetts, the District of Massachusetts is not one where these suits "might have been brought," as required by 28 U.S.C. 1404(a).

The district court (Van Dusen, J.) noted that such a transfer will not impose any undue burden on the plaintiffs (App., *infra*, pp. 4a–5a). The court further concluded that the transfer will serve the convenience of the witnesses, observing (1) that most of the survivors, eyewitnesses and other potential witnesses on the issue of negligence reside in the Boston area, (2) that Philadelphia is not more convenient to other potential negligence witnesses than Boston, (3) that all negligence witnesses would be inconvenienced by having to testify at two trials

rather than one, and (4) that, although most of plaintiffs' witnesses on damages come from the Philadelphia area, it is unlikely that many of the suits will go to trial on the damages issue once the liability issue has been determined (App., *infra*, pp. 5a–9a). The court also concluded that the interests of justice require the transfer because (1) consolidation of all cases relating to this single accident will result in fairer and more orderly trials and will save time and expense for the public, jurors and other litigants, (2) the conduct of as few trials as possible on the issues of liability and culpability will avoid duplication and inconsistent results, (3) the District of Massachusetts is the only federal district in which all defendants (including the Massachusetts Port Authority) can be served, (4) the litigation should be tried at the situs of the accident and in a forum more familiar with applicable state law, and (5) the docket of the Massachusetts court is less congested than that of the Pennsylvania court (App., *infra*, pp. 9a–14a).[3]

Rejecting each of the various grounds upon which

[3] The court also listed several reasons why transfer was required under 28 U.S.C. 1404(a) in relation to the government: (a) that, because of the nature of the claims against it, the government should be permitted to bring the Massachusetts Port Authority in as a third-party defendant, (b) that the District of Massachusetts is the only district in which all suits against the government may be brought, (c) that the Massachusetts court is most familiar with the law applicable to the government (*i.e.*, "the whole law of the State where the act or omission occurred") and (d) that limitations on liability imposed by Massachusetts law are not applicable to the government, whatever may be their applicability to other parties (App., *infra*, pp. 19a–20a).

the plaintiffs resisted transfer, the district court concluded that the District of Massachusetts was a district in which these suits "might have been brought," notwithstanding the fact that the plaintiffs had not obtained ancillary appointments as personal representatives in Massachusetts (App., *infra*, pp. 20a–23a). The court concluded that the contention that this was an obstacle to the suits' being brought in Massachusetts was a "legal fiction" which "should not be a basis for rejecting the use of" 28 U.S.C. 1404(a); the court noted that the lack of appointment merely went to a defense that might be raised in the Massachusetts proceeding.[4] Accordingly, the court ordered the requested transfer.

On plaintiffs' petitions for writs of mandamus and prohibition, the court of appeals held that the district court had exceeded its authority in entering the transfer order and directed the issuance of a writ of mandamus. The court reasoned that, under Rule 17(b) of the Federal Rules of Civil Procedure, capacity to sue in federal courts is governed by state law and that, since under Massachusetts law a foreign fiduciary is not qualified to maintain suit in Massachusetts without securing ancillary appointment, such an appointment is a prerequisite to a foreign fiduciary's bringing suit in the District of Massachusetts. Although recognizing that venue and personal jurisdiction would be properly laid in Massachusetts and

[4] The court also stated (App., *infra*, p. 23a) that "[t]he defendants, by requesting these transfers, will be estopped from objecting to the capacity of the personal representative plaintiffs to proceed in these actions."

acknowledging that ancillary appointment would "quite likely" be granted if applied for (App., *infra*, pp. 32a–33a), the court concluded that the personal representative plaintiffs did not have the "unqualified right" to proceed in Massachusetts and hence that these suits were not suits which "might have been brought" there within the meaning of 28 U.S.C. 1404(a).[5]

REASONS FOR GRANTING THE WRIT

The decision of the court below is, we submit, plainly erroneous and presents an important question of federal procedure which should be decided by this Court.

1. The ruling of the court below is contrary to the manifest purpose of 28 U.S.C. 1404(a) and to the spirit of the decisions of this Court interpreting it. The artificial limitation which the lower court would impose upon transfers to a more convenient forum will plainly lead to "the wastefulness of time, energy and money that § 1404(a) was designed to prevent" and frustrate its "design to protect litigants, witnesses and the public against unnecessary inconvenience and expense." See *Continental Grain Co.* v. *Barge FBL–585*, 364 U.S. 19, 26, 27. Moreover, it is

[5] It was brought to the court's attention that in two of the suits before it (*Braff* v. *United States*, C.A. No. 30,304, E.D. Pa., and *Long* (*Reitz*) v. *United States*, C.A. No. 30,303, E.D. Pa.), venue had been improperly laid in the Eastern District of Pennsylvania. As to these suits, apparently relying on 28 U.S.C. 1406(a) (which permits transfer of such a case to the district "in which it could have been brought"), the court held that the transfer to Massachusetts was proper (App., *infra*, p. 34a). See note 11, *infra*.

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based on a technical, formalistic approach to the statute, rather than the liberal "common-sense approach * * * in interpreting § 1404(a)" called for by this Court. *Continental Grain Co.* v. *Barge FBL–585, supra,* 364 U.S. at 24.

Prior decisions of this Court disclose the essential standards governing application of the transfer statute. Its origin in the doctrine of *forum non conveniens* makes it clear that Section 1404(a), like the superseded doctrine, may be applied, within the discretion of the district court, whenever there are two or more forums having jurisdiction over the defendant and venue of the action, see *Hoffman* v. *Blaski,* 363 U.S. 335, 335–336; *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 506–507.* From this, and from the liberal purposes of the statute, it follows that considerations other than the existence of jurisdiction and venue in the transferee court will not preclude transfer but are among the factors that the transferor court must take into account in determining the "convenience of parties and witnesses" and the "interest of justice." Cf. *Gulf Oil Corp.* v. *Gilbert, supra,* 330 U.S. at 508–509; *Norwood* v. *Kirkpatrick,* 349 U.S. 29, 32. Transfer to a more convenient forum is not to be impeded by legal technicalities and fictions. *Continental Grain Co.* v. *Barge FBL–585, supra,* 364 U.S. at 23, 26.

On these decisional premises, the court below plainly erred in holding that the District of Massa-

*Of course, such jurisdiction or venue cannot be conferred simply by the defendant's waiver. *Hoffman* v. *Blaski, supra.* See pp. 9–10, *infra.*

chusetts was not a district in which the present suits "might have been brought" for purposes of the transfer statute. As the court recognized (App., *infra*, p. 32a) and as no party disputes, that district has jurisdiction over the defendants, and venue is proper there.[7] The fact that the plaintiffs have failed or refused to seek ancillary appointment there is plainly the sort of legal technicality or fiction rejected in the *Continental Grain* case, *supra*. Such appointment is ordinarily a mere formality: thus, to obtain ancillary appointment in Massachusetts, one need only present an appropriate petition and appoint a resident of Massachusetts as an agent for service of process, Mass. Ann. Laws, Chs. 193, 195, Sec. 8. As the court below acknowledged, "it is quite likely that most of [the plaintiffs] would have been so appointed" (App., *infra*, p. 33a). Moreover, these formalities are not jurisdictional prerequisites to the commencement of suit but may be reflected in a later amendment of the complaint, *Boudreau* v. *New England Transportation Co.*, 315 Mass. 423, 53 N.E. 2d 92. We submit that the decision below, in permitting this purely technical default to preclude transfer, undermines the purpose and operation of 28 U.S.C. 1404(a) and should be reviewed by this Court.

2. There is no support in the decisions of this Court for the lower court's ruling. The court placed reliance upon *Hoffman* v. *Blaski*, 363 U.S. 335 (App., *infra*, pp. 30a–31a); but, as the district court pointed

[7] Such jurisdiction and venue does not depend upon any consent or waiver on the part of the defendants. See note 6, *supra*.

out (App., *infra*, pp. 22a–23a), that decision has no application here. There the Court had before it an attempt to transfer a case to a district where venue was not proper, although the defendant was willing to waive the defect; the Court held, however, that the venue requirement implicit in the statutory phrase, "other district * * * where [the suit] might have been brought," could not be satisfied by waiver or consent.

That the *Hoffman* decision does not govern a case where venue and jurisdiction in the transferee court are proper without consent, and only a formality stands in the way of transfer, was made abundantly clear by this Court's later decision in *Continental Grain Co.* v. *Barge FBL–585*, 364 U.S. 19. There the Court, in holding that a fiction of admiralty law did not preclude transfer under 28 U.S.C. 1404(a), emphasized that its *Hoffman* ruling was limited to a case where "the defendant legally could not have been subjected to suit" in the transferee court (364 U.S. at 21–22)—*i.e.*, where venue or jurisdiction would be improper there. Thus, the present case (in which unconsented venue and jurisdiction are proper in the transferee court), rather than being governed by the *Hoffman* case, rather plainly falls under the "common-sense approach" of the *Continental Grain* case (364 U.S. at 24).

Indeed, the *Hoffman* case suggests one of the strongest reasons for holding that a case like the present is transferable under 28 U.S.C. 1404(a). The Court there refused to allow a defendant, by granting or withholding a waiver of venue, greater freedom of

transfer than a plaintiff would have, on the ground that this would constitute "gross discrimination" (363 U.S. at 344). But the decision below would give a similarly discriminatory power to plaintiffs in representative actions, since it allows them to litigate in the one State in which they have seen fit to qualify, notwithstanding that a district in another State, having jurisdiction over the defendant and venue of the action, would be a more convenient forum.

3. The importance of the question presented by this case is plainly apparent, affecting as it does all representative actions. If the holding below is allowed to stand, the possibility of consolidating multiple claims arising out of major disasters—such as airplane accidents[8]—will be virtually eliminated.[9] To borrow this Court's words, that holding "would practically scuttle the *forum non conveniens* statute" with respect to representative actions and would "provide a shelter" for such actions "in costly and inconvenient forums" (*Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19, 24, 27).

At the same time, adoption of the lower court's construction of 28 U.S.C. 1404(a) would, by fore-

[8] As of December 31, 1962, there were pending in the various federal district courts over 420 Federal Tort Claims Act cases arising out of airplane crashes or mid-air collisions. Of these, 274, or more than 60 percent, are cases filed in multiple jurisdictions throughout the country, although all 274 arise out of 6 airplane disasters. One of these 6 accidents has led to suits in as many as nineteen district courts.

[9] As petitioners in No. 738 point out (Pet. 8), only a small minority of the States permit a foreign fiduciary to obtain judgment on the basis of his foreign appointment.

closing transfer and consolidation for trial before a single tribunal, saddle federal trial courts with an unnecessary workload in a vast number of multiple lawsuit situations arising out of a single occurrence, and thus make even more difficult the proper, efficient and expeditious administration of the federal court system.[10] It is to be noted, too, that the decision below would have application beyond 28 U.S.C. 1404(a); for example, it is difficult to see why it would not be equally applicable with respect to 28 U.S.C. 1406(a), which authorizes the transfer of a case from a district in which venue was improperly laid to one "in which it could have been brought."[11]

In the circumstances, the need for review of the decision below is compelling.

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[10] The Director of the Administrative Office of the United States Courts, in his 1962 Annual Report (p. I–14), notes that multiple jurisdiction suits "involve production of substantially the same witnesses" and documents so that "chaos would result if all the courts having such suits" attempted to proceed at the same time.

[11] Presumably on the basis of 28 U.S.C. 1406(a), the court below approved the transfer to Massachusetts of two cases in which venue had been improperly laid in the Eastern District of Pennsylvania (see note 5, *supra*), notwithstanding that the plaintiffs had not qualified as personal representatives in Massachusetts. Counsel for the plaintiffs, recognizing the complete inconsistency between this action and the court's holding with respect to the other cases, have asked the court to modify its opinion to withdraw approval of the transfer of these two cases. The court has not yet acted on these requests.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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FEBRUARY 1963.

APPENDIX

In the United States District Court For the Eastern District of Pennsylvania

CIVIL ACTIONS Nos. 28664, 28741, 28762, 28763, 28764, 28788, 28789, 29099, 29100, 29159, 29160, 29161, 29162, 29274, 29275, 29615, 29616, 29724, 29768, 29881, 29882, 29883, 29884, 29901, 30078, 30079, 30200, 30230, 30257, 30258, 30259, 30260, 30263, 30266, 30284, 30288, 30289, 30300, 30301, 30302, 30303, 30304, 30305, 30306, 30343, 30344, and 30346

AND

Nos. 321, 323, 325, 327, 329, 335 and 375 of 1961 in Admiralty

SIDNEY W. POPKIN

v.

EASTERN AIR LINES, INC., AND LOCKHEED AIRCRAFT CORP., AND GENERAL MOTORS CORPORATION and succeeding cases captioned in the orders of 10/17/61 (Document No. 24 in C.A. 28664) and 11/1/61 (Document No. 7 in C.A. 29724), except Civil Actions Nos. 30390 and 30391

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Opinion sur motions to transfer

VAN DUSEN, J. APRIL 6, 1962.

These 55 cases,[1] involving fatal and, as to three plaintiffs, non-fatal injuries suffered when an Electra airplane manufactured by Lockheed, having engines made by General Motors, and owned and operated by Eastern, crashed approximately one minute after take-off in Boston Harbor on October 4, 1960, are before the court on Motions to Transfer under 28 U.S.C.A. § 1404(a). There are 114 similar cases pending in the United States District Court for the District of Massachusetts (see Document No. 30 in C.A. 30078). The record in these cases (see, particularly, statements of Lee S. Kreindler, Esq. at the argument) indicates that the primary basis for liability on which the plaintiffs presently rely is alleged fault of the defendants resulting in bird ingestion by the turbo-prop engines of the plane involved in this suit, as well as in engines of other planes using the Logan International Airport, Boston, at about the time of the accident.

In *Jurgelis* v. *Southern Motors Express*, 169 F. Supp. 345 (E.D. Pa. 1959), this court said:

[1] There are 28 plaintiffs involved in these 55 cases, since 13 plaintiffs have filed two suits in this court and 7 plaintiffs have filed three cases in this court resulting from the injuries received in the October 4, 1960, airplane accident at Boston, Mass. Only one of the 114 cases in the Massachusetts District Court is an admiralty action, whereas 7 of these cases are suits in admiralty brought by the same parties who have also filed Civil Actions in this court.

Wherever "plaintiffs" is used, it includes libellants and wherever "defendants" is used it includes respondents.

One of these cases has already been transferred due to improper venue (C.A. 30307).

In *Norwood* v. *Kirkpatrick*, 1955, 349 U.S. 29, * * * the Supreme Court, in discussing the relation of 28 U.S.C.A. § 1404(a) to the doctrine of forum non conveniens as recognized by the Supreme Court in *Gulf Oil Corp.* v. *Gilbert*, 1946, 330 U.S. 501, * * * said at page 32 * * *:

"* * *, we believe that Congress, by the term 'for the convenience of parties and witnesses, in the interest of justice,' intended to permit courts to grant transfers upon a lesser showing of inconvenience. This is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered, but only that the discretion to be exercised is broader."

It appears, therefore, that under the present state of the law, the factors to be considered by a court in determining whether or not to transfer the action under §1404(a) are established by the Gulf Oil Corp. case,[2] and the degree

[2] In the *Gulf Oil Corp.* v. *Gilbert* case, supra, the court said at pp. 508–9:

"* * * An interest to be considered and the only likely to be most pressed, is the private interest of the litigant. Important considerations are the relative ease of access to sources of proof; availability of compulsory process for attendance of unwilling, and the cost of obtaining attendance of willing, witnesses; possibility of view of premises, if view would be appropriate to the action; and all other practical problems that make trial of a case easy, expeditious and inexpensive. There may also be questions as to the enforcibility of a judgment if one is obtained. The court will weigh relative advantages and obstacles to fair trial. It is often said that the plaintiff may not, by choice of an inconvenient forum, 'vex', 'harass', or 'oppress' the defendant by inflicting upon him expense or trouble not necessary to his own right to pursue his remedy. But unless the balance is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed.

"Factors of public interest also have place in applying the doctrine. Administrative difficulties follow for courts when

> of discretion to be exercised by the court is established by the Norwood case.

The last sentence quoted above was approved by Chief Judge Biggs, sitting specially in this court, in *Medich* v. *American Oil Company*, 177 F. Supp. 682, 683 (E.D. Pa. 1959). See, also, *All States Freight* v. *Modarelli*, 196 F. 2d 1010 (3d Cir. 1952), where the court said at page 1011:

> The statute limits the privilege of the plaintiffs to have his lawsuit tried in the forum of his choosing if he can there get jurisdiction over the defendant. The purpose of the limitation is clearly to make the inevitably uncomfortable (for the litigant) judicial process cheaper and more convenient and, if possible, more prompt.

After consideration of the record in these cases, the undersigned has concluded that transfer is required under 28 U.S.C.A. § 1404(a), as follows:

I. Convenience of the parties

In this case, plaintiffs claim their convenience would be served by a trial in this District and the defendants claim that it would be more convenient for them to have these cases tried in the District of Mas-

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litigation is piled up in congested centers instead of being handled at its origin. Jury duty is a burden that ought not be imposed upon the people of a community which has no relation to the litigation. In cases which touch the affairs of many persons, there is reason for holding the trial in their view and reach rather than in remote parts of the country where they can learn of it by report only. There is a local interest in having localized controversies decided at home. There is an appropriateness, too, in having the trial of a diversity case in a forum that is at home with the state law that must govern the case, rather than having a court in some other forum untangle problems in conflict of laws, and in law foreign to itself."

sachusetts.[3] The burden on the survivor-plaintiffs of presenting their damage testimony in the transferee District has not been overlooked, but this is a burden often falling upon persons who, having elected to travel away from home, are involved in accidents and must have been considered by Congress in enacting 28 U.S.C.A. § 1404(a). None of the affidavits allege that any of the plaintiffs is impecunious, nor is their financial condition stated in the record.

II. Convenience of witnesses

The record makes clear that the District of Massachusetts will be more convenient for the presently known witnesses on the issues of liability and of degree of culpability of the defendants.[4] The Collins

[3] There is nothing in 28 U.S.C.A. § 1404(a) which precludes transfer because the plaintiff is a resident of the transferor District. See, for example, *Norwood* v. *Atlantic Coast Line RR. Co.*, C.A. 15810, p. 4 of opinion of then Chief Judge (now Senior Judge) Kirkpatrick dated 7/12/54, petition for writ of mandamus and prohibition denied (3rd Cir., No. 11,364, on 7/16/54), aff'd. sub. nom. *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955); *Harry Winston, Inc.* v. *Zale Jewelry Company*, 191 F. Supp. 686 (S.D.N.Y. 1961); *Huff* v. *Nashville, Chattanooga & St. Louis Ry.*, 88 F. Supp. 735 (S.D.N.Y. 1949). As stated in *Brown* v. *Woodring*, 174 F. Supp. 640, 645 (M.D. Pa. 1959):

"'Defendant's mandatory margin for victory * * * need not be an overwhelming one.' A court should not hestitate to disturb plaintiff's choice of forum if the three statutory factors dictate transfer."

[4] The Massachusetts Death Act, in relevant part, provides:

"A person who (1) by his negligence causes the death of a person * * *, or (2) by wilful, wanton or reckless act causes death of a person * * *, or (2) operates a common carrier of passengers and by his negligence causes the death of a passenger, or (4) operates a common carrier of passengers and by his wilful, wanton or reckless act causes the death of a passenger * * *, shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability. * * * A

Affidavit (Document No. 31 in C.A. 28664) alleges that (a) all but six of the 47 eye witnesses to the accident known to General Motors reside in the District of Massachusetts and within 25 miles of Boston (par. 12);[5] (b) four of ten survivors of the crash reside in the District of Massachusetts and within 60 miles of the center of Boston;[6] (c) four employees of the Logan Airport who prepared the plane for flight reside in the vicinity of Boston; (d) seven operators of the control tower at Logan International Airport, who were eye witnesses to the aircraft's flight and crash and who would know the time of the take-off and crash, reside within 25 miles of center city Boston (see par. 15 of Document No. 31 in C.A. 28664); (e) all but one of the six experts who first examined the bodies of the dead birds reside within twelve miles

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person shall be liable for the negligence or the wilful, wanton or reckless act of his agents or servants while engaged in his business to the same extent and subject to the same limits as he would be liable under this section for his own act, except that the damages are to be assessed with reference to the degree of culpability of his agents or servants."

Mass. Ann. Laws, c. 229, §2 (Suppl. 1961).

[5] The second sentence of this paragraph states: "These witnesses observed the takeoff, flight and crash of the aircraft and would be able to testify to its flight path, describe the nature of its flight and crash and furnish testimony relevant to the time interval between takeoff and crash."

[6] In par. 13 of this Affidavit, it is alleged that these witnesses would be able to testify as to the course of the plane's flight, the sound of its engines, and the results of the crash. In par. 4 of the unsworn answer to the Motions of Transfer filed by plaintiffs in Civil Actions Nos. 28664, 29881, 29882, 29883, 29884, 29901, 30300, 30307 and 30344 and Nos. 321, 323, 325, 327, 329, 335 and 337 of 1961 in Admiralty, it is alleged that Major Sylvester Koenig resides in Greenville, S.C. (Document No. 35 in C.A. 28664), rather than Falmouth, Mass., as alleged in this paragraph 13, but the residence of this survivor of the crash is not stated in any affidavit filed by plaintiffs.

of center city Boston and the sixth such expert resides in New Hampshire, approximately 60 miles from Boston (see par. 17 of Document No. 31 in C.A. 28664); and (f) five other potential witnesses having knowledge of the presence of birds at the airport, and some of whom discovered dead birds at the airport, reside within 25 miles of Boston (see pars. 16 and 18 of Document No. 31 in C.A. 28664).[7] Also, it is clear that it will be more convenient for such witnesses if there is to be one trial, rather than several, and if the discovery can be conducted under the supervision of one court.[8] Cf. *MacAlister* v. *Guterma*, 263 F. 2d 65, 68–70 (2nd Cir. 1958).

Plaintiffs have not filed any affidavits contradicting the above sworn allegations, but have emphasized, generally, without listing any additional, specific witnesses in their affidavits (except for six individuals listed without specifying the area of their testimony in Document No. 35 in C.A. 28741 and five individuals listed as damage witnesses for one plaintiff in Document No. 29 in C.A. 30078), that most of their compensatory damage witnesses come from this district or near it.[9] Experience in this and other Districts

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[7] The Wickenhaver Affidavit lists some of the same witnesses as those referred to above in the Collins Affidavit. See Exhibit B to Document No. 30 in C.A. 28664. In par. 8 of that Affidavit, there is named an additional witness as to the birds living in the transferee District (John J. Phelan, of Winthrop, Mass.).

[8] Since the United States of America is one of the defendants, the only District in which all the actions can be consolidated for trial is Massachusetts. See 28 U.S.C.A. § 1402(b), providing that the United States may only be sued "where the plaintiff resides or wherein the act or omission complained of occurred."

[9] For example, the McConnell Affidavit (Document No. 29 in C.A. 30078) lists six compensatory damage witnesses that plaintiff Ward wishes to call "from this area" and does not

indicates that, once the issues of liability have been determined, relatively few of a large group of cases such as these, resulting from one accident, go to trial on the damage issues. Furthermore, as indicated below, there are several legal hurdles the personal representative plaintiffs have to overcome before compensatory damages become pertinent in their cases.[10]

Some plaintiffs also stated in their affidavits that they seek to establish that the accident occurred as the result of negligent design and testing of the engines by General Motors, negligent design and testing of the aircraft by Lockheed, negligent testing of the aircraft, as well as negligent training and physical examinations of the flight personnel, by Eastern, and negligence of the Government in execution of its responsibility for flight safety. See par. 8 of Document No. 29 in C.A. 30078. At the argument, it was admitted that plaintiffs hoped that the Government agency investigating the crash would be able to show faulty design and testing of the aircraft and its engines, but no definite finding to this effect has been made over 18 months after the crash. Hence, there is nothing specific on the record to show that any large number of witnesses from outside the Boston area, and for whom the transferor District would be more convenient than the transferee District, will be required for the trial of the above-mentioned issues of liability and degree of culpability. Employees of

deny that he was also hospitalized in the Boston area or that medical witnesses from that area could present helpful evidence on the issue of damages—see, also, Affidavits attached to Document No. 35 in C.A. 28664 and Documents Nos. 34 and 35 in C.A. 28741.

[10] If agreement on damages cannot be secured in the cases against the Government, it is most probable that the Government would agree to a determination of the damage issues by this court.

the defendants from California and Indiana, referred to at page 10 of the Kreindler Affidavit, being Document No. 12 in C.A. 29724, would not be substantially inconvenienced any more by a trial in Philadelphia than one in Boston,[11] but it is clear that they will be inconvenienced by having to testify at trials in both places, as opposed to one trial in Boston (see footnote 8 above, showing that the transferee District is the only place where there can be a single trial). Employees of the Civil Aeronautics Board, Bureau of Safety, will similarly have to testify in the District of Masachusetts in any event and, if the transfer of these 55 cases is denied, they will have to attend another trial in this District.

III. The interest of justice

The interest of justice requires the transfer of these cases to the transferee District for these reasons, among others:

(1) Consolidation of all the cases arising from this accident for purposes of proceedings before trial is likely to procure fairer and more orderly trials for all litigants and save needless time and expense for the public, including jurors, and other litigants whose cases are awaiting trial

See *MacAlister* v. *Guterma, supra,* at 68–70; *O'Donnell* v. *Watson Bros. Transportation Company,* 183 F. Supp. 577 (N.D. Ill. 1960); and cases cited in those cases. With reference to the argument in the attached letter of January 11, 1962 (based on a letter from the Clerk of the Massachusetts District dated January 9, 1962, which is also attached), that "there is nothing to be gained administratively by the transfer of these matters to Boston," the United States

[11] A trial in this District would be less convenient for defendants since it would require them to transport their employees to testify at least twice from the west or mid-west to the eastern part of this country.

District Court for the District of Massachusetts has informed the undersigned that all the cases arising out of this accident have been assigned to one judge, who is handling all such cases for purposes of proceedings prior to trial and will consider possibilities of severance of issues for trial, as well as consolidation for trial, at the appropriate time.[12] As pointed out in *Kelly* v. *Greer*, 295 F. 2d 18, 21 (3d Cir. 1961), even after a consolidation order has been entered, it "does not freeze the future conduct of the litigation."

(2) The conduct of as few trials as feasible on the issues of liability and culpability

The purpose of the Federal Rules of Civil Procedure was to encourage consolidation wherever this was fair and possible. See *Sutcliffe Storage & Warehouse Co.* v. *United States*, 162 F. 2d 839, 851 (1st Cir. 1947); *United States* v. *Knauer*, 149 F. 2d 519 (7th Cir. 1945), aff'd. 328 U.S. 654 (1946); cf. *Walker* v. *Loop Fish & Oyster Co.*, 211 F. 2d 777, 780–1 (5th Cir. 1954); *Howey* v. *Yellow Cab Co.*, 181 F. 2d 967, 973 (3d Cir. 1950), aff'd. sub. nom. *United States* v. *Yellow Cab Co.*, 340 U.S. 543 (1951). In the *Howey* case, *supra*, the court said at page 973:

> Surely the stricture of the Sherwood case * * *, would not serve to require second, separate trials with the United States as the sole defendant, the issue being one of contribution, for such second, separate trials would embrace the same evidence as that already received and would be conducted before the same judge.

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[12] Paragraph 8 of the Lockwood Affidavit (Document No. 30 in C.A. 30078) refers to the normal progress of a case in the United States District Court for the District of Massachusetts, whereas the court has informed the undersigned that this case is being treated as a protracted case and not "in the normal course." See Handbook of Recommended Procedures for the Trial of Protracted Cases, 25 F.R.D. 351 (1960).

Federal trial courts have consistently recognized the fairness and desirability of consolidating cases for trial, particularly on the issue of liability. See *Weitort* v. *A. H. Bull & Company*, 192 F. Supp. 165 (E.D. Pa. 1961); *Hassett* v. *Modern Maid Packers, Inc.*, 23 F.R.D. 661 (D. Md. 1959); *Polak* v. *Koninklijke Luchtvaart Maatschappij, etc.*, 19 F.R.D. 87 (S.D.N.Y. 1956); and cases cited in those cases. In the *Polak* case, *supra*, the court said at page 88:

> The advantages of consolidating multiple claims arising from a single accident outweigh even the considerations requiring strict enforcement of the rules on jury demand. * * * [Citing case.] Recent experience with the trial of such consolidated claims in this court indicates that almost invariably the only evidence peculiar to each claim is that relating to damages. Most of the trial court's time is consumed by the trial issues common to all of the cases. Considerations of expense as well as the convenience of witnesses, litigants and the Court, and the expeditious dispatch of judical business, impel consolidation under such circumstances.

In the *Hassett* case, *supra*, involving five actions arising out of one accident, the court said at page 664:

> * * * it will save time for parties, witnesses, counsel and courts, to have the entire matter disposed of at one trial. * * *
>
> The five cases should be consolidated for trial under Rule 42(a), but, as permitted by Rule 42(b), the jury shall first hear the evidence on the issue of liability and decide that issue for all the cases.

It is neither fair nor just that there should be a different liability result for some of these plaintiffs than there is for others. Transfers under 28 U.S.C.A. 1404(a) have resulted from the desirability of consoli-

dating the transferred cases for trial with other similar cases pending in the transferee District. See *A/S Dampskibsselskabet Svendbord* v. *United States*, 116 F. Supp. 603 (E.D. Tex. 1953), where the court said at page 606:

> However, a more important consideration, it would seem, is that all of the facts and circumstances necessary to determine the rights of the parties will have to be presented both there and here at different times, and it is possible that the two Courts could reach conflicting conclusions; whereas if the case filed here is transferred, it can be consolidated with those in the Southern District of New York and all rights determined in a single trial without the possibility of such a conflict.

See, also, *Continental Grain Co.* v. *Barge FBL–585*, 364 U.S. 19, 21 (1960); *Cressman* v. *United Air Lines*, 158 F. Supp. 404 (S.D.N.Y. 1958); *Winsor* v. *United Air Lines*, 153 F. Supp. 244 (E.D.N.Y. 1957).

Recently, the United States Court of Appeals for the Second Circuit has emphasized the desirability of consolidation of separate actions involving common questions of law and fact for purposes of pre-trial and trial under the supervision of one judge or master. See *MacAlister* v. *Guterma, supra*. In *Crosley* v. *Hazeltine Corporation*, 122 F. 2d 925 (3d Cir. 1941), the United States Court of Appeals for the Third Circuit said at page 930:

> It is of obvious importance to all the litigants to have a single determination of their controversy, rather than several decisions which if they conflict may require separate appeals to different circuit courts of appeals. No party has a vested right to have his cause tried by one judge rather than by another of equal jurisdiction. * * * The economic waste involved in duplicating litigation is obvious. Equally im-

portant is its adverse effect upon the prompt and efficient administration of justice. In view of the constant increase in judicial business in the federal courts and the continual necessity of adding to the number of judges, at the expense of the taxpayers, public policy requires us to seek actively to avoid the waste of judicial time and energy. Courts already heavily burdened with litigation with which they must of necessity deal should therefore not be called upon to duplicate each other's work in cases involving the same issues and the same parties.

(3) The District of Massachusetts is the only federal jurisdiction where all defendants can be served

The defendants (particularly the United States of America and Eastern Air Lines, Inc.) emphasized at the argument that they wish to join the Massachusetts Port Authority (owner and operator of the Boston Airport) as a third-party defendant and service can only be obtained on that entity in the District of Massachusetts (see page 4 of Kreindler Affidavit, Document No. 12 in C.A. 29724). This court has consistently recognized that the ability to join a third-party defendant in the transferee forum is a consideration in favor of transfer. See *Allied Petro Products Incorporated, etc.* v. *Maryland Casualty Company*, C.A. No. 30180, and cases cited at pages 3–4 of Opinion of 12/22/61 (Document No. 7). The unfairness which can result from different results in separate trials of actions arising from the same accident is illustrated in cases such as *Curtis* v. *A. Garcia Y. Cia*, 272 F. 2d 235 (3rd Cir. 1959), where differing records in two trials produced a liability result for defendant and third-party defendant which it is quite possible that neither fact finder would have reached if both actions had been considered at the same trial.

(4) Other reasons favoring transfer of the cases in the interest of justice

In addition to the above factors favoring the transferee District as the only place where fair proceedings before trial and a fair trial for all parties on the issues of liability and culpability may be had, the following factors mentioned by the United States Supreme Court in *Gulf Oil Corp.* v. *Gilbert* (see second paragraph quoted in footnote 2, *supra*) favor trial in the transferee District:

> "(a) The litigation will be handled "at its origin," rather than in this court, the docket of which is more congested than that of the transferee District (see par. 7 of Wickenhaver Affidavit, being Exhibit B to Document No. 31).
>
> (b) The trial of the issues of liability and culpability will be held "in a forum that it as home with the state law."

One of the principal arguments of the personal representative plaintiffs who oppose the transfer is that they will be deprived of the benefits of the public policy embodied in the Pennsylvania Constitution (particularly Article I, Section 11, and Article III, Section 21) if these cases are transferred. Cf. § 612 of Restatement of Conflicts of Law. This argument against transfer is rejected for these reasons, among others:

A. There is no reason to believe that a Federal Judge, sitting in Massachusetts, will not be just as able in selecting and interpreting the applicable law as such a judge sitting in Pennsylvania will be

The Supreme Court of the United States has recently stated: "The general conflict-of-laws rule, followed by a vast majority of the States, is to apply the law of the place of injury to the substantive rights of the parties." *Richards* v. *United States*, 369 U.S.

(1962).[13] In view of the possibility that the decision in the cases pending in the Pennsylvania State Courts referred to under B below may make moot the argument against application of the above-quoted rule in this case, it is not necessary to decide at this time such questions argued by counsel as the application to this situation of §§ 384, 391 (comment d), 412, 517 and 612 of the Restatement, Conflict of Laws, and as, when a case is transferred under 28 U.S.C.A. § 1404 (a) does the transferee court determine the rights of the parties on the basis of the law that would have been applied in the District where the suit was originally filed. See *Headrick* v. *Atchison, T. & S.F. Ry. Co.*, 182 F 2d 305, 309–310 (10th Cir. 1950); *Gomez* v. *The SS. Dorothy*, 183 F. Supp. 499, 512 (D. Puerto Rico 1959); *Hargrove* v. *Louisville & Nashville Railroad Company*, 153 F. Supp. 681, 684 (W.D. Ky. 1957); *Greve* v. *Gibraltar Enterprises*, 85 F. Supp. 410, 414 (D. New Mex. 1959);[14] and authorities cited in those cases. The transferee court will be better able to pass on these questions, if necessary, after decision of the cases pending in the Pennsylvania State Courts mentioned in footnote 20 below.

B. Contention that Pennsylvania public policy prevents enforcement of the measure of recovery but accepts the right of action provided in the Massachusetts Wrongful Death Act should not be ruled upon at this time

Relying on (1) a recent dictum of four out of seven justices of the New York Court of Appeals

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[13] It is noted that in referring to the rule of some states "to take into account the interests of the State having significant contact with the parties to the litigation," the court did not refer to any Pennsylvania or Massachusetts cases in footnote 26 of its opinion (see page—of 369 U.S.).

[14] In this case, the court used this language at page 414:

"It appears the rule should be that the legal rights of the parties are determined by the law of the state or district in which the cause originates. In other words, a change of venue affects the place of trial only."

in *Kilberg* v. *Northeast Air Lines, Inc.*, 9 N.Y. 2d 34, 211 N.Y.S. 2d 133, 172 N.E. 2d 526 (1961), to support the application of Article 3, § 21, of the Pennsylvania Constitution,[15] (2) an older Pennsylvania Supreme Court case. [*Passenger Railway Co.* v. *Boudreau*, 92 Pa. 475, 481–2 (1880)] to support the application of Article 1, § 11, of the Pennsylvania Constitution [16] and (3) general language in Pennsylvania cases that foreign penal statutes will not be enforced in Pennsylvania courts,[17] the personal rep-

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[15] Article 3, § 21, provides:

"* * * in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."

Article 1, § 18, of the New York Constitution, relied on in the *Kilberg* case, *supra*, provides: "The right of action now existing to recover damages for injuries resulting in death shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitations." It is noted that in view of the reasoning used to support the majority's dictum in the *Kilberg* case, the same result might not be applicable to defendants such as Lockheed and General Motors, which are not common carriers who sold tickets in the forum to domiciliaries or residents of the forum.

[16] Article 1, § 11, of this Constitution provides:

"All courts shall be open; and every man for an injury done him in his lands, goods, person or reputation shall have remedy by due course of law, and right and justice administered without sale, denial or delay."

[17] *Nesbitt* v. *Clark*, 272 Pa. 161 (1922); *Commercial Nat. Bank* v. *Kirk*, 222 Pa. 567 (1909). Although language in *Massachusetts Bonding Co.* v. *United States*, 352 U.S. 128, 132 (1956), is relied on to establish that the Massachusetts Wrongful Death Act is penal, the Pennsylvania appellate courts have recognized that the words "penal" and "penalty" have different shades of meaning. See *Commonwealth* v. *Musser Forests, Inc.*,

resentative plaintiffs contend that they are entitled to recover compensatory damages without limit in these actions because of the alleged, strong Pennsylvania public policy opposed to the $20,000 limit in the Massachusetts Wrongful Death Act. Defendants argue that neither the Pennsylvania appellate court nor the Federal decisions have applied such a public policy to invalidate such foreign state limitations on recovery in the past. See, for example, *Slater* v. *Mexican National R.R. Co.*, 194 U.S. 120 (1904); *Knecht* v. *United States*, 242 F. 2d 929 (3rd Cir. 1957); *Rennekamp* v. *Blair*, 375 Pa. 620 (1954); cf. *Hughes* v. *Railroad Co.*, 202 Pa. 222, 228–9 (1902); and *Quaker Mills Corp.* v. *Howard Corp.*, 131 Pa. Super. 1, 8–9 (1938).[18] Also, defendants contend that

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394 Pa. 205, 146 A. 2d 714 (1958); *Laughlin et al.* v. *Baltalden, Inc.*, 191 Pa. Super. 611, 617–8 (1960); cf. *Ward* v. *Rice*, 29 F. Supp. 714 (E.D. Pa. 1939). The Pennsylvania appellate courts have also recognized that there is a strong public policy in enforcing rights and duties validly created by foreign law. See *Personal Fin. Co.* v. *Gen. Fin. Co.*, 133 Pa. Super. 582, 585–6 (1938).

[18] In the *Hughes* case, the court used this language at pp. 228–9:

"Where a contract containing a stipulation limiting liability for negligence, is made in one state, but with a view to its performance, by transportation through or into one or more other states, we see no reason why it should not be construed in accordance with the law of the state, where its negligent breach, causing injury occurs. If such a contract comes under construction, in a state like Pennsylvania whose policy prohibits such exemption, and the injury has occurred in a state where the contract is valid, the stipulation will be enforced, as in *Forepaugh* v. *R.R. Co.*, and in *Fairchild* v. *R.R. Co.* But if the injury has taken place within its limits, it will declare the contract null and void, as in *Burnett* v. *R.R. Co.* In the *Fairchild* case, as the injury occurred in Maryland, this court enforced the law of that state; if the injury to the horse had been

the full faith and credit clause requires Pennsylvania courts to follow all the terms of the Massachusetts Wrongful Death Act, relying on *First Nat. Bank* v. *United Air Lines*, 342 U.S. 396, 400-401 (1952); *Order of Travelers* v. *Wolfe*, 331 U.S. 586 (1947); *Bradford Elec. Co.* v. *Clapper*, 286 U.S. 145, 160 (1932). Finally, defendants argue that if this Massachusetts Act may not be applied in these cases, there can be no recovery at all, since the plaintiffs have no remedy.

However, in accordance with the repeated statements of the Supreme Court of the United States that District Courts should abstain from deciding issues involving the Constitution and public policy of a state so as to afford the state courts a reasonable opportunity to decide such matters,[9] the determination of the

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delayed until in the course of the journey, it had reached Pennsylvania, our own law of public policy would have controlled." This approach seems different than the New York law, as exemplified in the *Conklin* case, relied on in the majority opinion in *Kilberg* at page 528 of 172 N.E. 2d.

[9] See *Harrison* v. *N.A.A.C.P.*, 360 U.S. 167, 176-8 (1959); *Louisiana P. & L. Co.* v. *Thibodaux City*, 360 U.S. 25 (1959); and cases cited in Note, "Abstention: An Exercise in Federalism," 108 U. of Pa. Law Rev. 2226 (1959). In the *Thibodaux* case, the court said at page 27: "We have increasingly recognized the wisdom of staying actions in the federal courts pending determination by a state court of decisive issues of state law." In the *Harrison* case, the court said at page 176:

"This now well-established procedure is aimed at the avoidance of unnecessary interference by the federal courts with proper and validly administered state concerns, a course so essential to the balanced working of our federal system. To minimize the possibility of such interference a 'scrupulous regard for the rightful independence of state governments * * * should at all times actuate the federal courts,' *Matthews* v. *Rodgers*, 284 U.S. 521, 525, as their 'contribution * * * in furthering the harmonious relation between state and federal authority * * *.'"

law governing the measure of damages in these actions should be postponed until the trial on the issues of liability and culpability has been completed. Meanwhile, a Pennsylvania appellate court decision may become available to enlighten us on the public policy of this Commonwealth in this situation, since there are two cases pending in the state courts in which there will be an opportunity for the foregoing contention to be submitted to the Pennsylvania courts.[20]

Abstention of decision on this aspect of the case at this time will also prevent a premature decision on the Constitutional issue of the application of the full faith and credit clause.[21] Cf. *Railroad Comm'n.* v. *Pullman Co.*, 312 U.S. 496, 501 (1941).

Finally, it should be noted that the considerations stated in 28 U.S.C.A. § 1404(a) require the transfer of the actions brought against the Government for these reasons, among others:

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[20] It is noted that two actions previously pending in this court (C.A. Nos. 30390 and 30391) have been remanded to the state court and are now pending there (Court of Common Pleas No. 4 of Philadelphia County, Sept. Term 1961, No. 237, and Court of Common Pleas No. 6 of Philadelphia County, Sept. Term 1961, No. 238).

[21] Also, it is noted that the application of the Full Faith & Credit Clause to the dictum of the majority in the *Kilberg* case is raised by an appeal now pending in the United States Court of Appeals for the Second Circuit from *Pearson, etc.* v. *Northeast Airlines, Inc.*, Civ. 147-142 in the U.S. District Court for the Southern District of New York, Opinion and Order filed 11/15/61. Counsel have informed the court that the New York District Court reached a contrary decision to *Pearson, supra*, in *Trauth* v. *Northeast Airlines, Inc.* (S.D.N.Y., C.A. 149-256, 1961), where a New Jersey citizen was plaintiff, on the ground that New Jersey's policy differed from that of New York. An excerpt from the transcript of the court's statements in *Trauth, supra*, is appended to the attached letter of 1/9/62 from counsel for General Motors.

(a) The basis of the claims against the Government makes it only fair that it be permitted to bring in as a third-party defendant the Massachusetts Port Authority, as operator of the airport.

(b) The District of Massachusetts is the only District where all the suits against the Government may be brought (see footnote 8 above);

(c) The Massachusetts Federal Court is most familiar with "the whole law of the State where the act or omission occurred" which must be applied in the suits against the Government, see *Richards* v. *United States, supra,* at page—; and

(d) There is no contention that the above-mentioned public policy contained in the Pennsylvania Constitution applies to these Government suits, which are not governed by the measure of damages in the Massachusetts Wrongful Death Act.

The many factors dictating transfer of the cases against the Government (19)[22] must be considered as a factor favoring transfer of the other cases pending in this District, so that all cases arising from this accident may be treated uniformly by the court which must dispose of the great majority of such cases.

Plaintiffs in C.A. 30078, C.A. 30346 and C.A. 30284 contend that these wrongful death actions may not be transferred under 28 U.S.C.A. § 1404(a) since they were not appointed as personal representatives in Massachusetts and, hence, could not have brought actions there,[23] relying on *Hoffman* v. *Blaski,* 363 U.S. 335 (1960). However, the Supreme Judicial Court of Massachusetts has held that a foreign personal rep-

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[22] Civil Actions Nos. 28764, 28788, 28789, 29100, 29161, 29162, 29275, 29616, 29901, 30230, 30257, 30258, 30263, 30302, 30303, 30304, 30305, 30306 and 30343.

[23] See *Boutillier* v. *Wesinger,* 322 Mass. 495, 496, 78 N.E. 2d 195 (1948).

resentative may bring a suit under the wrongful death act and later qualify in the forum,[24] even though the Statute of Limitations has run at the time of such later qualifications,[25] in *Boudreau* v. *New England Transportation Company*, 315 Mass. 423, 426–7, 53 N.E. 2d 921, where the court said:

> Even apart from any admission under G.L. (Ter. Ed.) c. 231, § 30, this is not a case where there was no plaintiff in existence when the action was brought. The plaintiff was a live person in whatever capacity she was acting or purporting to act. The question was whether she had the capacity to maintain the action. She could assert that she had and could bring the action and try the issue of her competency to maintain it. The action was therefore not a mere nullity but was from the first a genuine lawsuit and an adequate basis for an amendment alleging an appointment in the State of the forum when such appointment was secured.

Although this is a close question, this contention of plaintiffs is rejected for these reasons:

A. *The District of Massachusetts is a District where Congress designated litigation of this type might be brought*

The appropriate Congressional Title of the United States Code (Title 28 covering "Judiciary and Judicial Procedure") provides in Chapter 85 (District Courts; Jurisdiction) at Section 1332(a) and in Chapter 87 (District Courts; Venue) at Sections 1391(a) and (c) and 1402(b) for institution of these actions in the District of Massachusetts.

In determining where a suit might have been brought, the dissenting opinion in *Paramount Pic-*

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[24] See Mass. Gen. Laws, Ch. 193, §§ 1 & 2, Ch. 194, § 5, Ch. 195, § 8, Mass. Ann. Laws, Ch. 204, § 3.

[25] Cf. *Brennan* v. *Rooney*, 139 F. Supp. 484, 486–7 (E.D. Pa. 1956).

tures v. *Rodney*, 186 F. 2d 111, 116 (3d Cir. 1951), which was quoted with approval in *Hoffman* v. *Blaski*, *supra*, at 343, states:

> The district judge * * * had to decide whether the Northern District of Texas was a place where the suits "might have been brought." A reasonable and obvious way of determining this was to see whether Congress in some other statute had designated the places where litigation of this sort might be brought.
>
> * * * * * *
>
> This background suggests that proper venue in more than one forum is the limiting context of the Code revision and that within this context Section 1404(a) substitutes a broad power of transfer for a more restricted pre-existing power of dismissal. Plaintiffs are prevented from abusing their normal privilege of choice among districts of proper venue. At the same time, courts are directed to respect the legislative enumeration of places which Congress has deemed appropriate for the trial of various types of litigation. (pp. 116 & 118).

B. A "common-sense approach" in interpreting Section 1404(a) of Title 28 to accomplish its purposes requires a construction that these cases "might have been brought" in the District of Massachusetts. See Continental Grain Co. v. Barge FBL-585, supra

For the reasons stated above, it is "in the interest of justice" and "for the convenience of * * * witnesses" that these actions be transferred to the District of Massachusetts. Under such circumstances, legal fictions such as the state which has authorized a personal representative to act should not be a basis for rejecting the use of 28 U.S.C.A. § 1404(a). See *Continental Grain Co. v. Barge FBL-585, supra*, at 22-24. In distinguishing *Hoffman* v. *Blaski, supra*, the court said at page 22 of the *Barge FBL-585 case:*

> Those cases involved transfers in which the plaintiffs filing the suits would have had no

right whatever to proceed originally against the defendants on the "civil actions" in the District Courts to which transfer was sought without the defendants' consent. But in this case there was admittedly a right on the part of the grain company to subject the owner of the barge, with or without its consent, to a "civil action" in Memphis at the time the New Orleans action was brought.

In applying 28 U.S.C.A. § 1404(a), courts do not consider all the defenses which might have been, or be, raised in the transferee forum and decide whether an action might have been successfully brought there.[26] See *Greve* v. *Gibraltar Enterprises, supra,* at 412–3; cf. *Ackert* v. *Bryan,* — F. 2d —, 30 L.W. 2310 (2nd Cir. 1962).

The defendants, by requesting these transfers, will be estopped from objecting to the capacity of the personal representative plaintiffs to proceed in these actions. See *Greve* v. *Gibraltar Enterprises, supra,* at 414.[27]

(S) FRANCIS L. VAN DUSEN, J.

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[26] It is noted that "It is not necessary to aver the capacity of a party to sue or * * * the authority of a party to sue * * * in a representative capacity * * *" but such matters must be raised "by specific negative avertment. * * *" See F.R. Civ. P. 9(a).

[27] There are attached to this opinion letters from counsel dated January 9, January 11, January 12 and February 14 with enclosures (including copy of letter of January 9, 1962, from the Clerk of the U.S. District Court for the District of Massachusetts, which was enclosed with the letter of January 11).

In the United States District Court
for the Eastern District of Pennsylvania

CIVIL ACTIONS Nos. 28664, 28741, 28762, 28763, 28764, 28788, 28789, 29099, 29100, 29159, 29160, 29161, 29162, 29274, 29275, 29615, 29616, 29724, 29768, 29881, 29882, 29883, 29884, 29901, 30078, 30079, 30200, 30230, 30258, 30260, 30263, 30266, 30284, 30288, 30289, 30300, 30301, 30302, 30303, 30304, 30305, 30306, 30343, 30344, and 30346

SIDNEY W. POPKIN

v.

EASTERN AIR LINES, INC., and LOCKHEED AIRCRAFT CORP. and GENERAL MOTORS CORPORATION and succeeding cases captioned in the orders of 10/17/61 (Document No. 24 in C.A. 28664) and 11/1/61 (Document No. 7 in C.A. 29724), except Civil Actions Nos. 30257, 30259, 30307, 30390 and 30391 and all Admiralty Actions

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Order Sur Motions to Transfer

(Documents Nos. 28, 29 & 30 in C.A. 28664; Nos. 30, 31 & 32 in C.A. 28741; Nos. 23, 24 & 25 in C.A. 28762; Nos. 26, 27 & 28 in C.A. 28763; Nos. 13 & 15 in C.A. 28764; Nos. 13 and 15 in C.A. 28788; Nos. 13 & 15 in C.A. 28789; Nos. 22, 23 & 24 in C.A. 29099; Nos. 12 & 14 in C.A. 29100; Nos. 22, 23 & 24 in C.A. 29159; Nos. 22, 23 & 24 in C.A. 29160; Nos. 11 & 13 in C.A. 29161; Nos. 11 & 13 in C.A. 29162; Nos. 22, 23 & 24 in C.A. 29274; Nos. 12 & 14 in C.A.

29275; Nos. 20, 21 & 22 in C.A. 29615; Nos. 9 & 11 in C.A. 29616; No. 9 in C.A. 29274; Nos. 15, 16 & 17 in C.A. 29768; Nos. 15, 16 & 17 in C.A. 29881; Nos. 15, 16 & 17 in C.A. 29882; Nos. 15, 16 & 17 in C.A. 29883; Nos. 15, 16 & 17 in C.A. 29884; Nos. 8 & 11 in C.A. 29901; Nos. 21, 22 & 23 in C.A. 30078; Nos. 20, 21 & 22 in C.A. 30079; Nos. 11, 12 & 13 in C.A. 30200; No. 7 in C.A. 30230; No. 2 in C.A. 30258; Nos. 12, 13 & 14 in C.A. 30260; No. 2 in C.A. 30263; Nos. 9, 10 & 13 in C.A. 30266; Nos. 15, 16, 17 & 24 in C.A. 30284; No. 6 in C.A. 30288; No. 6 in C.A. 30289; Nos. 13, 14 & 15 in C.A. 30300; Nos. 13, 14 & 15 in C.A. 30301; No. 11 in C.A. 30302; No. 4 in C.A. 30303; No. 2 in C.A. 30304; No. 11 in CA. 30305; No. 2 in C.A. 30306; No. 12 in C.A. 30343; Nos. 13, 14 & 15 in C.A. 30344; Nos. 15, 16 & 17 in C.A. 30346)

AND NOW, April 6, 1962. IT IS ORDERED that the above-captioned cases are TRANSFERRED to the United States District Court for the District of Massachusetts pursuant to 28 U.S.C.A. §1404(a).

(S) FRANCIS L. VAN DUSEN, J.

See Opinion filed earlier today.

United States Court of Appeals for the Third Circuit

Nos. 13994, 13997, 14003, 14011, 14033

ROBERTA BARRACK, ADMX., ETC., ET AL., PETITIONERS IN No. 13994

SIDNEY W. POPKIN, ET AL., PETITIONERS IN NO. 13997

HOWARD H. RAPP, ADMR., ETC., ET AL., PETITIONERS IN No. 14003

LEAH BIERNBAUM, EXTRS., ETC., ET AL., PETITIONERS IN No. 14011

DORIS A. LAISTER, EXTRX., ETC., ET AL., PETITIONERS IN No. 14033

v.

THE HONORABLE FRANCIS L. VAN DUSEN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, RESPONDENT

and

EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION, GENERAL MOTORS CORPORATION AND THE UNITED STATES OF AMERICA, INTERVENORS

ON PETITIONS FOR WRITS OF MANDAMUS OR PROHIBITION

Argued October 2, 1962

Before STALEY and FORMAN, *Circuit Judges*, and LANE, *District Judge*

Opinion of the Court

(Filed November 19, 1962)

By STALEY, *Circuit Judge*.

Petitioners seek writs of mandamus or prohibition directing respondent to vacate and set aside his order transferring these actions to the United States District Court for the District of Massachusetts. The order was entered pursuant to § 1404(a) of 28 U.S.C.,[1] but has been stayed pending the disposition of these petitions.

The actions arise out of the crash of an Eastern Air Lines Electra airplane in Boston Harbor on October 4, 1960. These suits were filed in the District Court for the Eastern District of Pennsylvania by two survivors of the crash and by the personal representatives of several deceased passengers. Named as defendants were Eastern Air Lines, Inc., Lockheed Aircraft Corp., General Motors Corp., and in several instances, the United States. On April 6, 1962, respondent entered an order granting defendants' motions for transfer pursuant to an opinion filed that same day.[2]

With respect to the death actions, petitioners assert that respondent was without power to enter the order of transfer because the Massachusetts District Court

[1] "§ 1404. *Change of venue*

"(a) For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a) (1958 ed.).

[2] The opinion is reported at 204 F. Supp. 426.

is not a district where these actions "might have been brought" within the meaning of § 1404(a). Additionally, they argue that because the transferee forum may apply a different rule of substantive law to these suits,[3] the order should be vacated as a matter of law. Lastly, they contend that the order constitutes a clear abuse of discretion. Because we hold that respondent did not have power to transfer these actions, we find it unnecessary to consider petitioners' alternative arguments.

At the outset, we are faced with defendant-intervenors' contention that the petitions for writs of mandamus or prohibition are inappropriate in these circumstances. It must be noted that respondent does not join in presenting this argument.

Our recent decision in *Swindell-Dressler Corp.* v. *Dumbauld*, — F. 2d — (C.A. 3, 1962), makes it abundantly clear that mandamus is appropriate when the question presented is whether the district court acted without jurisdiction in granting a motion to transfer under § 1404(a). However, intervenors urge that petitioners had an adequate remedy of appeal under the provisions of the Interlocutory Appeals Act, 28 U.S.C.A. § 1292(b).[4] But that very issue was

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[3] The Massachusetts Death Act provides in relevant part:

"A person who (1) by his negligence causes the death of a person in the exercise of due care * * * shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability * * *." Mass. Ann. Laws, C. 229, § 2. It has been held to be punitive in nature. *Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U.S. 128 (1956).

[4] "§ 1292. Interlocutory decisions

* * * * *

"(b) When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of

squarely raised in *Swindell-Dressler* and was decided in the negative.[8] We, therefore, conclude that these petitions are properly before us.

On the merits, petitioners contend that because the personal representatives in the death actions have not obtained ancillary appointment in Massachusetts, they lack capacity to bring the actions in that state, and thus § 1404(a) does not authorize transfer to that district. Initially, reference is made to Rule 17(b) of the Federal Rules of Civil Procedure, which provides in revelant part: "In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held * * *."

Next, petitioners point out that under the law of Massachusetts a personal representative appointed in another state is not thereby qualified to maintain suit in Massachusetts, *Boutillier* v. *Wesinger*, 322 Mass. 495, 78 N.E. 2d 195 (1948), and that appointment as an ancillary or special administrator is in the discre-

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law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order * * *." 28 U.S.C. § 1292(b) (1958 ed.).

[8] As we indicated in *Milbert* v. *Bison Laboratories, Inc.*, 260 F. 2d 431, 433 (C.A. 3, 1958), a portion of the legislative history of § 1292(b) would appear to support intervenors' contention. However, as we there pointed out, the district judge's written statement in the order, conforming to the language of the statute, is an essential condition precedent before we may even entertain an application for permission to appeal. Here, respondent, being fully aware of the provisions of § 1292(b), failed to include such a statement in his order. Moreover, as heretofore indicated, he has expressly dissociated himself from intervenors' argument as to the availability of § 1292(b) and the propriety of mandamus.

tion of the Massachusetts probate judge, Mass. Ann. Laws, C. 193, § 10. Finally, the Supreme Court's decision in *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), is cited as being dispositive of the issue before us.

In *Hoffman*, the district court in which suit had been properly brought transferred it to a district which did not have venue of the cause. The Supreme Court, affirming the judgment of the Seventh Circuit, held that this defect precluded transfer. The phrase "where it might have been brought" was construed as applying to the time when suit was originally instituted. With respect to the argument that the venue defect had been waived by the defendant's motion to transfer, the Court said, "But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff." 363 U.S. at pp. 343–344.

Respondent and intervenors would limit the holding in *Hoffman* v. *Blaski, supra*, to the requirement that the transferee forum have both venue and jurisdiction of the cause. They state that the existence of other potential defenses does not preclude removal, and cite several cases in which transfer has been effected although the suits would have been barred by the statute of limitations applicable in the transferee district.* Additionally, they argue that the

* *H. L. Green Co.* v. *McMahon*, — F. 2d — (C.A. 2, 1962); *Headrick* v. *Atchison, T. & S.F. Ry.*, 182 F. 2d 305 (C.A. 10, 1950); *Gomez* v. *S.S. Dorothy*, 183 F. Supp. 499 (D. Puerto Rico, 1959); *Crawford* v. *S.S. Shirley Lykes*, 148 F. Supp. 958 (S.D.N.Y. 1957); *Curry* v. *States Marine Corp.* v. *Delaware*, 118 F. Supp. 234 (S.D.N.Y. 1954); *Frechoux* v. *Lykes Bros. S.S. Co.*, 118 F. Supp. 234 (S.D.N.Y. 1953); *Greve* v. *Gibraltar Enterprises*, 85 F. Supp. 410 (D.N.M. 1949). Six of these

phrase "the action" does not include the parties to the action.

We think that the holding in *Hoffman* v. *Blaski, supra,* compels the conclusion that respondent was without power to transfer these actions. The import of that decision is that unless the plaintiff *had an unqualified right to bring suit* in the tranferee forum at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a). Hence, the fact that at oral argument counsel for intervenors expressed a willingness to waive any objection to petitioners' capacity to sue in Massachusetts is beside the point. Nor can the district court's statement that these actions involve the legal fiction of the appointment of a personal representative be used as a basis for distinguishing them from *Hoffman* v. *Blaski, supra.* Certainly, the requirement of capacity to sue is no more a legal fiction than is the necessity for having proper venue. Obviously, it, like venue, can be waived. Rules 9(a) and 12(h), Fed. R. Civ. P. But waiver or the possibility of waiver did not alter the Supreme Court's conclusion in *Hoffman.* In short, we can perceive no basis in either logic or policy for making any distinction between the absence of venue in the transferee forum and a prospective plaintiff's lack of capacity to sue there.

A similar conclusion was reached in *Felchlin* v. *American Smelting and Refining Co.*, 136 F. Supp. 577 (S.D. Calif. 1955). There, suit was filed by California executors, and the defendant moved to dismiss or, in the alternative, to transfer the suit to the Western District of Texas. The court held that be-

---

seven cases antedate *Hoffman* v. *Blaski, supra.* Moreover, the decisions in all seven were based upon the legal conclusion that the statute of limitations of the state of the transferor district would apply.

cause Texas forbids suits by foreign executors, the proposed transferee forum was not a district "where the action might have been brought." Accordingly, the motion was denied.

Respondent and intervenors seek to distinguish *Felchlin* from the case at bar on the grounds that a suit by a foreign personal representative in Texas is a nullity, whereas in Massachusetts lack of capacity is a mere defense to the action and can be waived. However, we deem this distinction insubstantial, for whether lack of capacity precludes a prospective plaintiff from filing suit in the first instance, or subjects him to a dismissal at the instance of the defendant, the result is the same. In either case he does not have an unqualified right to sue.

The transfer sanctioned in *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960), is no help to respondent and intervenors, for that decision is premised on a fiction peculiar to the admiralty law.

The attempted differentiation between "the action" and the parties thereto is based on the language of Rules 13(h), 24, and 25 (b) and (c) of the Federal Rules of Civil Procedure. We think it without merit. These rules refer to the addition, intervention, or substitution of parties to a law suit which has already been instituted. Thus, they necessarily make separate reference to the action and the parties to the action. More important, to say that the action and the parties thereto are separate and distinct is to ignore reality, for the identity of the parties is determinative of such basic matters as jurisdiction and venue.

The argument that petitioners could have brought these suits in Massachusetts, irrespective of the waiver of intervenors, by obtaining ancillary appointment misses the mark, for it ignores the fact that such appointment is discretionary with the probate court.

Mass. Ann. Laws, C. 193, § 10. Of course, it is quite likely that most of these petitioners would have been so appointed. That, however, is immaterial, for the fact remains that here, as in *Hoffman*, petitioners did not have an independent right to maintain suit in Massachusetts.

Respondent and intervenors urge that the construction which petitioners seek would unduly circumscribe § 1404(a) in any action brought by a personal representative. The short answer to this is that by the use of the phrase "where it might have been brought" Congress intended that the power to transfer should not be unqualified. That most jurisdictions do not permit foreign personal representatives to bring suit in their courts as a matter of right is a well known rule of law, and we cannot presume that Congress intended to alter state policy to the extent of permitting transfer of such suits to the federal courts sitting in those states. Indeed, as we previously noted, Rule 17(b), Fed. R. Civ. P., requires the district court to refer to the law of the state in which it sits to determine capacity to sue. Finally, we must accept § 1404(a) as it has been construed by the Supreme Court in *Hoffman* v. *Blaski*, *supra*, i.e., that it permits transfer only if the plaintiff at the time of the commencement of the action had an independent right to institute suit in the transferee district.

Of course, our holding that the district court was without jurisdiction to transfer these suits relates only to the death actions. However, in light of this opinion the district court may wish to reconsider the transfer of the two personal injury suits, particularly as the death actions, which constitute the great majority of these suits, will now be tried in the Eastern District of Pennsylvania.

What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Subsequently, counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. Thus, with respect to these three suits, the district court's order of transfer was proper and will not be set aside.

We assume that it will not be necessary to issue the writ unless a petition for certiorari is filed, and that the district court will vacate the order of transfer in accordance with this opinion.

United States Court of Appeals for the Third Circuit

No. 13,994

ROBERTA BARRACK, ADMX., ETC., ET AL.,
PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13,997

SIDNEY W. POPKIN, ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,003

HOWARD H. RAPP, ADMR., ETC., ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14,011

LEAH BIERNBAUM, EXTRS., ETC., ET AL.,
PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14,033

DORIS A. LAISTER, EXTRX., ETC., ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN

Present: STALEY and FORMAN, *Circuit Judges,* and LANE, *District Judge*

Upon consideration of the petitions for writs of mandamus or prohibition, of the answers by respondent and of the briefs, and after hearing:

It is ORDERED, ADJUDGED and DECREED by this Court that the prayers of the petitions be and the same hereby are granted and the Clerk of this Court is hereby directed to issue the writs of mandamus in accordance with the opinion of this Court.

By the Court.

STALEY, *Circuit Judge.*

Dated: December 7, 19—.

United States Court of Appeals for the Third Circuit

No. 13994

BARRACK, ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13997

POPKIN, ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14003

RAPP, ADMINISTRATOR, ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14011

BIERNBAUM, ET AL., EXECUTORS, ETC., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN

No. 14033

LAISTER, EXECUTRIX, ETC., ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN

Peremptory Writ of Mandamus

UNITED STATES OF AMERICA,
Third Judicial Circuit, ss:

To the Honorable Francis L. Van Dusen, Judge of the United States District Court for the Eastern District of Pennsylvania, greetings:

Whereas the Honorable Francis L. Van Dusen by order filed April 6, 1962 transferred to the United States District Court for the District of Massachusetts Civil Actions brought against Eastern Air Lines, Inc., Lockheed Aircraft Corp., and General Motors Corporation and Civil Actions brought against the United States, a copy of which order is attached to this writ and marked Exhibit "A";[1] and

Whereas the plaintiffs in the actions ordered to be transferred have filed petitions for writs of mandamus and prohibition directing the respondent to vacate and set aside his order of transfer; and

Whereas the respondent has filed answers to the petitioners; and

Whereas the matter came on to be heard before this Court on the aforesaid petitions, answers and briefs; and

Whereas after due deliberation thereon this Court rendered its opinion November 19, 1962, that the Honorable Francis L. Van Dusen exceeded his authority when he entered the order of transfer on April 6, 1962, with respect to the civil actions in the death cases; and

Whereas on December 7, 1962, this Court caused to be entered herein its order, directing the Clerk of this Court to issue the writ of mandamus and prohibition

[1] This Exhibit is printed at pages 35a-36a in the petition for a writ of certiorari filed in No. 738, this Term.

in accordance with the opinion of the Court: Now, therefore,

The respondent, the Honorable Francis L. Van Dusen is hereby required and commanded, immediately after the receipt of this writ, and without delay to vacate and set aside the order of April 6, 1962, in the civil actions enumerated in Exhibit "B" [2] attached to this writ.

IDA O. CRESKOFF,
Clerk of the United States Court of Appeals for the Third Circuit.

Dated: December 14, 1962.

[2] This Exhibit is printed at pages 37a–45a in the petition for a writ of certiorari filed in No. 738, this Term.

United States Court of Appeals for the Third Circuit

No. 13,994

BARRACK, ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13,997

POPKIN, ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,003

RAPP, ADMINISTRATOR, ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,011

BIERNBAUM, ET AL., EXECUTORS, ETC., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,033

LAISTER, EXECUTRIX, ETC., ET AL., PETITIONERS

vs.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

Present: STALEY and FORMAN, *Circuit Judges*, and LANE, *District Judge*

Upon consideration of the petition for stay of the execution of the peremptory writ of mandamus in

these cases filed by Intervenors, Eastern Airlines, Inc., Lockheed Aircraft Corporation and General Motors Corporation,

It is ORDERED That,

1. The execution of the peremptory writ of mandamus shall be stayed for a period of thirty days from December 14, 1962;

2. If within the said period of 30 days, there shall be filed with the Clerk of this court a certificate from the Clerk of the Supreme Court in accordance with Rule 36(2) of this Court's Rules, the stay shall continue until final disposition of these cases by the Supreme Court; and

3. The Honorable Francis L. Van Dusen is directed to stay further proceedings in these cases until further order of this Court.

By the Court.

STALEY.

Dated: December 26, 1962.

U.S. GOVERNMENT PRINTING OFFICE: 1963

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IN THE

Supreme Court of the United States

October Term, 1962

Nos. ~~[illegible]~~ and ~~[illegible]~~
56 80

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, EASTERN AIRLINES, INC., LOCKHEED AIRCRAFT CORPORATION, GENERAL MOTORS CORPORATION and the UNITED STATES OF AMERICA,

Petitioners,

v.

SIDNEY W. POPKIN, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF AND SUPPLEMENTAL APPENDIX FOR RESPONDENTS IN OPPOSITION.

ABRAHAM E. FREEDMAN,
MILTON M. BOROWSKY,
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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

Nos. 738 and 851.

THE HONORABLE FRANCIS L. VAN DUSEN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, EASTERN AIRLINES, INC., LOCKHEED AIRCRAFT CORPORATION, GENERAL MOTORS CORPORATION AND THE UNITED STATES OF AMERICA,

Petitioners,

v.

SIDNEY W. POPKIN, ET AL.,

*Respondents.**

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS IN OPPOSITION.

OPINIONS BELOW.

The opinion of the District Court (Appendix A, Petition No. 738) is reported sub nom. as *Popkin v. Eastern Airlines, Inc.*, at 204 F. Supp. 426 (E. D. Pa., 1962). The

* Separate briefs in opposition have been filed with the Supreme Court on behalf of respondents Barrack, et al.; Rapp, et al.; Biernbaum, et al., and Laister, et al.

opinion of the Court of Appeals for the Third Circuit directing that the order of the District Court be vacated (Appendix B, p. 23a of Petition No. 738) is reported at 309 F. 2d 953. The order of the Court of Appeals for the Third Circuit (Feb. 21, 1963) amending its opinion is not yet reported but is printed in Appendix A of this Brief in Opposition.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the two petitions.

QUESTIONS PRESENTED.

1. The District Court lacked the power to transfer the instant cases.

2. Transfer of the instant cases to Massachusetts would frustrate a determination by the forum in which the victims and their next of kin are domiciled as to the public policy and faith and credit to be accorded the penal provisions of the Massachusetts Death Statute.

3. Fact finders in the transferee forum could not be expected to make adequate and just awards to the respondents should the Pennsylvania rule of compensatory damages be adopted when, under the law of the forum, they would be compelled to limit recoveries under penal principles to their own domiciliaries.

4. The District Court abused its discretion under 28 U. S. C. A. Sec. 1404(a) by failing to consider the statutory criteria as applied to the total factual situation applicable to this litigation. There are no surpassing considerations to alter the plaintiffs' right to choose the forum of their domicile.

5. Pennsylvania has the most significant contacts with the parties. It is the plaintiffs' natural forum, residence and domicile. It is the place where the contract for transportation was made, where it had commenced and was to terminate. These cases are clearly distinct from those pending in Massachusetts which involve domiciliaries of that state and passengers southbound from Boston.

STATUTE INVOLVED.

Sec. 1404(a) of the Judicial Code, 28 U. S. C. 1404(a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE.

On October 4, 1960, an Eastern Airlines Lockheed Electra airplane crashed into the navigable waters of Boston Harbor immediately following take-off from a runway at Logan International Airport, Boston, Massachusetts. The ill-fated flight was en route to Philadelphia, Pennsylvania, and points south. Aboard the plane were sixty-seven passengers and a crew of five. Fifty-nine passengers and three crew members sustained fatal injuries. Nine of the ten survivors received serious bodily injuries. The aircraft was totally destroyed.

All the respondents but one are the personal representatives of passengers who lost their lives in the crash. Respondent Popkin is one of the few survivors.[1]

---

1. This Brief in Opposition is presented only on behalf of respondents Sidney W. Popkin, et al. (United States Court of Appeals, 3rd Cir., No. 13997). Briefs in opposition have been filed separately with the Supreme Court by respondents Barrack, et al.; Rapp, et al.; Biernbaum, et al.; and Laister, et al.

Pennsylvania is the domicile of the personal representatives of the estates of the decedents in every case but two.[2]

As a result of the crash respondents filed suits in the United States District Court for the Eastern District of Pennsylvania on behalf of the decedents and the injured passengers against the corporate defendants (Eastern Airlines, Inc.; Lockheed Aircraft and General Motors Corporation). In addition, separate suits have been instituted against the United States under the Federal Tort Claims Act. All the defendants are doing business or have agreed to the acceptance of service of process within the Eastern District of Pennsylvania and have been duly served.

Altogether fifty-five cases involving fatal and non-fatal injuries were instituted in the Eastern District of Pennsylvania by all the respondents against the corporate defendants and the United States.

Over the unanimous objection of plaintiff-respondents in all fifty-five actions, defendant-petitioners' motions for transfer under 28 U. S. C. A., Sec. 1404(a) to the United States District Court of Massachusetts were granted by petitioner, the Honorable Francis L. Van Dusen, District Judge.

Upon application to the Court of Appeals a Writ of Prohibition was granted reversing the transfer order, the Court of Appeals holding that the District Court did not have the power to transfer these actions to Massachusetts.

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2. In Attilio E. Abate, Administrator of the Estate of Frederick N. Abate, Deceased v. Eastern Airlines, et al. (Civil Action No. 30300, E. D. Pa.), the decedent and the personal representative were domiciled in Boston, Massachusetts, and the personal representative qualified in that state. (This suit was excepted from the order of the Court by consent of counsel.) In Diane Braff, Administratrix ad Prosequendum and as General Administratrix of the Estate of Bernard Jay Braff, Deceased v. Eastern Airlines, et al. (Civil Action No. 29884, E. D. Pa.), the decedent was and his personal representative is domiciled in nearby New Jersey, but there are substantial and significant conflict of law contacts relating to the decedent's transportation arising in the City of Philadelphia, which will be referred to hereinafter.

As a result of the crash one hundred fourteen suits were instituted on behalf of decedents and survivors in Massachusetts. These Massachusetts actions, with but few exceptions, involve decedents and personal representatives domiciled in Massachusetts, the latter having been qualified to administer the estates of decedents under the laws of Massachusetts. The Massachusetts instituted suits arise out of transportation contracts made in Massachusetts for air travel to commence in Boston for destinations southbound, including Philadelphia, Pennsylvania; Charlotte, North Carolina; Greenville, South Carolina; and Atlanta, Georgia.

In the instant cases, on the other hand, including all fifty-five actions, the contract of transportation was entered into in Philadelphia, Pennsylvania, for air travel to Boston and return air travel to Philadelphia. With but one or two exceptions the Eastern District of Pennsylvania is the domicile of the decedents and their personal representatives. It is likewise the residence of their decedents and witnesses to their professional, business and financial capabilities. With but one or two exceptions the personal representatives were appointed by Pennsylvania Courts; none received any Letters of Administration from any Probate Court of Massachusetts, and only one is qualified as a personal representative in Massachusetts.[3] But for

3. Through inadvertence of counsel two of the suits against the United States of America (Diane Braff, Administratrix ad Prosequendum and as General Administratrix of the Estate of Bernard Jay Braff, Deceased v. United States, Civil Action No. 30304 (E. D. Pa.), and Edna E. Long and Laura Manney, Administratrices of the Estate of Shirley E. Reitz, Deceased v. United States, Civil Action No. 30303 (E. D. Pa.), which the plaintiffs conceded to have been commenced in an improper venue under 28 U. S. C. A., Sec. 1402(b) were included in the application for the Writ of Prohibition. These actions were deleted subsequently (see amendment to Court of Appeals opinion, Appendix A), and applications for ancillary administrations are being processed in Massachusetts preliminarily to effecting a transfer of these actions to that jurisdiction. Reference by petitioners to these two cases as demonstrating an inconsistency in the opinion of the Court of Appeals is misleading and inaccurate.

three of the actions all the beneficiaries entitled to the benefits because of the untimely and wrongful deaths of the decedents are domiciliaries of Pennsylvania.

In addition to the interpretation of 1404(a) the respondents argued in the courts below that: (1) the trial judge abused his discretion afforded him under 1404(a) by failing to consider the statutory criteria as applicable to the total factual situation pertinent to this litigation; (2) there were compelling legal and factual distinctions separating these actions from the Massachusetts actions, thereby requiring that these suits remain in Pennsylvania.

One of the most compelling considerations urged by respondents in requesting the Court of Appeals to stay and reverse the transfer order of the District Court was to permit a court of the forum of the domiciliary (Pennsylvania) to determine if under Pennsylvania law, similar to that of New York, the State of Pennsylvania would likewise refuse to recognize the harsh and punitive features of the Massachusetts statute. Moreover, it was contended that even if the transferee jurisdiction (Massachusetts) could and would make such a determination, nevertheless the triers of facts and assessors of damage in Massachusetts could not be fairly expected to render fair awards to respondents in view of the irreconcilable standards that would have to be applied to Massachusetts victims as opposed to "outsiders" from the State of Pennsylvania.

REASONS WHY THE PETITION SHOULD BE DENIED.

I. The District Court Lacked Power to Transfer the Instant Cases.

The Court of Appeals was of the unanimous opinion that the District Court lacked the power to transfer these cases because the plaintiffs did not have an unqualified right to bring these actions in Massachusetts. The Court of Appeals therefore granted the Writ of Prohibition without finding it necessary to reach the question of abuse of discretion.[4] In order to avoid duplication, the legal argument in support of the opinion of the Court of Appeals is not discussed in this Brief in Opposition. This particular issue as raised and decided by the Court of Appeals will be and is discussed at length in the briefs in opposition as presented to this Court by respondents Rapp and Biernbaum. In this brief we shall devote our attention to those issues not passed upon by the Court of Appeals which independently compel the granting of a Writ of Prohibition against the transfer of these cases.

II. Transfer of the Instant Cases to Massachusetts Would Frustrate a Determination by the Forum in Which the Victims of the Air Crash and Their Next of Kin Are Domiciled as to the Public Policy and Faith and Credit to Be Accorded the Penal Provisions of the Massachusetts Death Statute.

Massachusetts is one of the two states in this country (Alabama being the other state) that limits recovery for wrongful death to punitive and not compensatory damages.

4. Said the Court of Appeals (p. 24a of Petition No. 738): ". . . Lastly, they (plaintiffs) contend that the order constitutes a clear abuse of discretion. Because we hold that respondent did not have the power to transfer these actions, we find it unnecessary to consider petitioners' alternative argument."

Under the general provisions of the Massachusetts Death Act (G. L. (Ter. Edition) Ch. 229, Sec. 2d, as amended, 7a-Ann. Laws of Mass. 407) recovery for wrongful death is punitive in nature and not compensatory. This Act provides that one (including a common carrier) who negligently causes the death of another "shall be liable in damages in the sum of not less than $2,000 nor more than $20,000 to be assessed with reference to the degree of his culpability or that of his agents or servants."

In *Massachusetts Bonding and Insurance Co. v. United States*, 352 U. S. 128, 129, 132 (1956), this Court held:

> "The assessment of damages with reference to the degree of culpability of the tortfeasor, rather than with reference to the amount of pecuniary loss suffered by the next of kin, makes those damages punitive in nature.
>
> • • •
>
> ". . . The standard of liability under the Massachusetts Death Act is punitive—i.e. 'with reference to the degree' of culpability—not compensatory."

The penal limitations of the Massachusetts Death Act oppose the almost universally accepted criterion that the dependents and next of kin of an innocent victim of a civil wrong should be compensated for their loss of support and benefits from the wrongdoer. The penal provisions of the statute have been held to be a sufficient affront and incompatible with the public policy of the state in which the victims of air crashes are domiciled so as to require their rejection. This was the result reached in two recent decisions that have claimed nationwide attention. In *Kilberg v. Northeast Airlines, Inc.*, 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961), the plaintiff's decedent was killed in an airplane crash in Nantucket, Massachusetts. The decedent as well as the plaintiff representative were New York domiciliaries. Suit was brought in the New York State Court.

The New York Court of Appeals held the damage features of the Massachusetts Death Act were incompatible with the public policy of New York. Said the Court (9 N. Y. 2d 40):

> "For our courts to be limited by this damage ceiling (at least as to our own domiciliaries) is so completely contrary to our public policy that we should refuse to apply that part of the Massachusetts law."

In *Pearson v. Northeast Airlines*, — F. 2d — (2nd Cir., Nov. 8, 1962), 8 Avi. 17,234, cert. denied — U. S. —, 31 L. W. 3259 (week of Feb. 19, 1963), the Massachusetts Death Statute was considered by the Second Circuit as it applied to a New York victim and his next of kin. The original panel held that New York must apply and enforce the Massachusetts punitive limitation statute. The Court, upon a rehearing, sitting en banc, reversed and reached the same conclusion as did the Court of Appeals of the State of New York in the *Kilberg* case. It forcefully endorsed the proposition that a federal court sitting in New York, the domiciliary state, could refuse for reasons of public policy and morality to apply the provisions of the Massachusetts Death Statute which limited recovery to punitive damages. The Court also held that neither full faith and credit nor due process was violated by refusing to enforce these limitations of the lex loci delecti.

Upon reflection it becomes obvious that the true motive behind corporate petitioners' motion to transfer is not an attempt to avoid two trials but an attempt to obtain the benefit of the penal limitations provisions of the Massachusetts Wrongful Death Act as to these plaintiffs.

II-A. Forum of the Domicile of the Victims, Their Dependents and Next of Kin Should Decide Policy Towards Penal Limitations of Massachusetts Act.

The *Kilberg* and *Pearson* decisions demonstrate the concern of the courts over the policy to be adopted toward

their domiciliaries. No other forum can appropriately determine this policy. This Court has recognized that a forum which has significant contacts with the parties may determine the law which shall govern the amount and measure of damages in foreign death actions and not the law of the place where the fatal injury was inflicted. Thus, in *Richards v. United States*, 369 U. S. 1 (1962), the Court took cognizance of the emerging conflicts of law rule holding at p. 12:

> "Recently there has been a tendency on the part of some states to depart from the general rule in order to take into account the interests of the state having significant contact with the parties to the litigation."

In the instant case Pennsylvania is: (1) the domicile of the personal representatives of the estates of the decedents as well as the domicile of the decedents and their next of kin; (2) the place where the contract of transportation by air was entered into; (3) the place where the transportation had commenced and where it was to have been concluded; (4) the en route destination of the aircraft at the time of the crash; (5) the residence of almost all of the witnesses as to the decedents' health, status, family relationships, professional, business and financial capabilities. Pennsylvania is therefore the forum which has a paramount and substantial interest in the application of the laws and public policy to be accorded these victims and their dependents and next of kin.

As the forum with such significant contacts, it may exercise a choice of conflicts of law rules subject only to constitutional restrictions. The full faith and credit clause does not compel a state to adopt any particular set of rules of conflicts of law. It merely sets up certain minimum requirements which each state must observe when asked to apply the law of the sister state. *Wells v. Simonds Abrasive Co.*, 345 U. S. 514 (1953).

It is especially significant to observe that Pennsylvania has a constitutional provision (Art. III, Sec. 21) similar to that of the State of New York (Art. I, Sec. 18) which prohibits any limitation upon the amount of recovery for injuries resulting in death or personal injury. The Pennsylvania courts refuse to enforce the penal laws of other states. *Commercial National Bank v. Kirk*, 222 Pa. 567 (1909). A penalty is regarded as anything a defendant is compelled by law to pay a plaintiff other than what is necessary to compensate the plaintiff for the legal damages caused him by the defendant. *Nesbitt v. Clark*, 272 Pa. 161 (1922), cert. denied 258 U. S. 621. Pennsylvania courts will not enforce the substantive law of the lex loci delecti if they regard such law as immoral and contrary to its public policy. *Stull's Estate*, 183 Pa. 625 (1898).

There is every reason to expect, therefore, that the *Kilberg* and *Pearson* decisions will receive favorable judicial recognition in Pennsylvania.

A forum sitting in Pennsylvania, steeped in its basic law and legal philosophies, should be the one to delineate the public policy of that state towards a foreign death statute which has such an adverse impact upon its domiciliaries as the death statute of Massachusetts. Certainly it should not be a forum in the state whose public policy has sponsored the law under challenge.

III. Fair and Just Awards Could Not Be Made by a Massachusetts Jury Under Pennsylvania Principles of Compensatory Damages.

Moreover, even if the transferee forum could recognize a double standard towards nonresident victims as opposed to its own domiciliaries, is it expectable that a Massachusetts jury could make a just and fair award in favor of the plaintiffs? Not only would the triers of the fact have to overcome their familiarity with and acceptance of a rule for death actions which applies in their native state, but they would be called upon to find in favor of "outsiders"

substantial awards which perforce under the Massachusetts Act they must deny to their own citizens. Such irreconcilable standards could only result in a substantial and unjust diminution in the recovery of damages to which the instant plaintiffs would be entitled.

IV. The District Court Abused Its Discretion Under 28 U. S. C., Sec. 1404(a) by Failing to Consider the Statutory Criteria as Applied to the Total Factual Situation Applicable to This Litigation.

The courts have always adhered to the general guiding proposition that as the plaintiff's choice of forum is a fact of high significance, especially where it coincides with his domicile, such choice should rarely be disturbed and then only upon a showing by the defendant that the balance of convenience is overwhelmingly in favor of transfer. *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 508 (1947). Courts have repeatedly held that the balance of convenience must be strongly in favor of the moving party before a transfer will be ordered. *Koster v. Lumbermen's Mutual and Casualty Co.*, 330 U. S. 518, 524 (1947); *Padgett v. Atlantic Greyhound Corp.*, 126 F. Supp. 124 (W. D. Pa., 1954); *Davis v. American Viscose Corp.*, 159 F. Supp. 218 (W. D. Pa., 1958); *Ford Motor Co. v. Ryan*, 182 F. 2d 329 (3rd Cir., 1950), cert. denied 340 U. S. 851.

Cognizant of the fact that almost every case involving multiple deaths resulting from an air crash raises the issue of transfer due both to the widespread nature of the activities of the usual defendants in these cases and to the fact that generally the passengers come from several states, many courts have been loath to grant transfer where the plaintiff's chosen forum is also his residence and/or domicile.

The case of *Bush v. United Airlines*, 148 F. Supp. 104 (S. D. N. Y., 1956), involved a New York decedent who was killed in an air crash in Wyoming. Suit was brought in

New York, and the defendant airlines sought transfer under 28 U. S. C. 1404(a). Said the Court:

"Unless the balance of convenience is strongly in favor of the defendant, the plaintiff's choice of forum should rarely be disturbed. See Ford Motor Co. v. Ryan, 2nd Cir., 182 F. 2d 329, 330, cert. denied 1950, 340 U. S. 851, 71 S. Ct. 79, 95 L. Ed. 624; Belair v. New York N. H. and H. R. Co., D. C. S. D. N. Y. 1950, 88 F. Supp. 572. Here, the plaintiff has properly exercised the venue privilege by initiating this action before this court. I have failed to find any substantiation for the defendant's argument that the plaintiff has chosen this forum on the basis of a 'shopping tour.' On the contrary, the plaintiff has all the cogent reasons possessed by a litigant acting with complete forthrightness. This action is a matter of grave concern to her and to her infant children. She has serious burdens of a legal and practical nature to sustain in the ensuing litigation. She can accomplish her task with far greater convenience here, where she is making her home with her children and earning her livelihood, than in Cheyenne, Wyoming, to which she is an utter stranger. This consideration is emphasized by the probable extended length of the trial which can take from two weeks to two months to try. *There is not even suspicion of harassment in her initiation of the suit in this district.* See Lewis v. American Airlines, Inc., D. C. S. D. N. Y., 1950, 91 F. Supp. 31, 33.

"The defendant is engaged in an extensive, nation-wide business of transporting passengers by air. In operating a business of this nature, it is reasonable to expect the defendant to anticipate the hazard and expense of suits filed against it at various points over the territory in which it operates. Moreover, the defendant should expect that such suits will require the transportation of such of its employees as it must call as witnesses to the places of trials. *The matter of*

transportation of witnesses would pose a problem more easily solved by the defendant than by the plaintiff. The fortuitous circumstance that this accident occurred through collision with a mountain in Wyoming should not operate to deprive the plaintiff of her choice of forum.

"In support of its motion to transfer this action the defendant has also argued that a possible consolidation of the plaintiff's action with other pending actions in Wyoming, arising out of the same accident, will lighten the burden of this court as well as those of the defendant. This may well be. But the transfer here sought cannot be justified by such an arrangement of convenience. A transfer of the plaintiff's action to Wyoming upon such considerations would be tantamount to a bargain of convenience at the expense of the plaintiff. The plaintiff has properly invoked the jurisdiction of this court and has come forward with sufficient reasons demonstrating that her choice of forum should not be disturbed. Motion denied." (Emphasis supplied.)

Other cases have noted that defendant transportation companies can easily transport witnesses.[5]

Lewis v. American Airlines, Inc., 91 F. Supp. 31 (S. D. N. Y., 1950), was a case in which the court denied defendant's motion to transfer to the state in which the crash occurred. The crash occurred in Texas, and the plaintiff resided in New York. Said the Court:

"On the whole, admitting that defendant will be inconvenienced by having to produce in New York a number of witnesses from distant places, and that it may be costly to it, still the equities, it seems to me, are the other way. Plaintiffs will be more than incon-

5. *Hohler v. Pennsylvania R. Co.*, 140 F. Supp. 487, 489 (D. C. Pa., 1956); *Naughton v. Pennsylvania R. Co.*, 85 F. Supp. 761, 763 (D. C. Pa., 1949).

venienced if the trial is moved to Texas. It will be a real hardship to them. It might very well prejudice their case. They may not be able to properly prove their case against defendant. They will have no way to compel their New York witnesses to go to Texas. Balancing the equities I feel that in the interest of justice the trial should be had in New York. *This is not a case where the plaintiff has picked an inconvenient forum to vex, harass or oppress the defendant by inflicting upon it expense or trouble not necessary to their rights to pursue their remedy. This is the natural forum for plaintiffs to start their action. It is their home, their residence and domicile.* Defendants must make out a stronger case than they have to change it." (Emphasis supplied.)

There are many other cases in which a court in refusing transfer has emphasized that the original district chosen is the residence of the plaintiff.[6]

The statement of facts in the instant fifty-five actions reveals that these cases are on all fours with the decisions in *Bush* and *Lewis, supra.*

V. The Eastern District of Pennsylvania Is a Convenient Forum to Try the Instant Cases.

At first blush it may appear that Massachusetts is a more convenient forum in which to try the instant cases.

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6. *Schindelheim v. Braniff Airways, Inc.*, 202 F. Supp. 313, 315 (S. D. N. Y., 1962); *General Courtland Cement Co. v. Perry*, 204 F. 2d 316 (7th Cir., 1953); *Cooper v. Camp Pinecrest, Inc.*, 175 F. Supp. 817 (D. C. N. Y., 1959); *Davis v. American Viscose Corp.*, 159 F. Supp. 218 (D. C. Pa., 1958); *Tyrill v. Alcoa S. S. Co.*, 158 F. Supp. 853 (D. C. N. Y., 1958); *Jenkins v. Wilson Freight Forwarding Co.*, 104 F. Supp. 422 (D. C. N. Y., 1952); transfer from plaintiff's residence to district where neither litigant resided refused, *First National Bank of Boston v. Fidelity and Deposit Co. of Md.*, 107 F. Supp. 894 (D. C. Mass., 1952); *Mason v. Chicago R. I. and P. R. Co.*, 96 F. Supp. 361 (D. C. Mo., 1951); *Millar Bros. and Co. v. Pennsylvania R. Co.*, 106 F. Supp. 532 (D. C. Pa., 1952).

A closer examination, however, of the complicated factual situation involving all of the parties defendant will disclose that the advantages of convenience in favor of trial in Massachusetts are not substantial. In the event that the Pennsylvania rule of damages is determined to be applicable, then the forum of convenience would be overwhelmingly Pennsylvania.

There is little dispute as to the manner in which the aircraft crashed after take-off. The number of eyewitnesses who as ground observers witnessed the brief crash episode will contribute little to the outcome of this litigation. On the other hand, the cause for the airplane moving in its course, its failure to recover, its control features, operational practices and the nature and extent of the injuries inflicted upon the passengers involve many causative factors of design, manufacture, assembly, construction, testing, inspection and instrumentation. Relevant, too, are development and compliance with standards and specifications and the adequacy of operational and maintenance instructions. The situs of these facts and the location of the witnesses possessing knowledge thereof are distant from Massachusetts and the scene of the air crash.[7] These are the factors which encompass the entire liability of Lockheed, General Motors and part of the claim against the United States and Eastern Airlines. See *Schindelheim v. Braniff Airways, Inc., supra,* involving another Lockheed Electra crash wherein transfer was refused.

The expert witnesses who examined the aircraft and its components following the crash and investigated the various phases of the mishap are mostly nonresidents of Massachusetts. The Government members of the Civil Aeronautics Board investigating staff are required by regulations to testify by depositions (14 C. F. R., Part 311c). Those investigating and representing the interests of the other defendants reside in New York, California and

7. See "Plaintiffs' Answer to Motion for Change of Venue Pursuant to 28 U. S. C. A., Sec. 1404(a)," Supplemental Appendix B.

Indiana. Besides several ornithologists from the local area and the personnel who attended the aircraft before take-off, there are a few local residents possessing knowledge of important and relevant facts. Of the survivors of the crash three were from Massachusetts, three from Pennsylvania, two from South Carolina, one from Mississippi and one from Florida. *Extensive changes* made to the runways, adjacent areas and pertinent taxiways at the Logan International Airport since the accident have rendered any view of the scene of little value to a jury's understanding of the circumstances and conditions which existed on the day of the crash.[8]

It is evident, therefore, that no substantial advantage accrues in selecting Massachusetts over Pennsylvania as the trial forum from the standpoint of availability or convenience to the witnesses on the issues of liability.

On the other hand, on the damage issue, as to all of the Pennsylvania claimants, there will be extreme hardship in producing witnesses regarding the victims' respective states of health, professional and financial capabilities, family and dependency relationships.[9] Besides the difficulty and convenience of producing and subpoenaing such witnesses at the trial, the burden and expense of transportation would be prohibitive. On the other hand, courts have taken cognizance of the fact that the defendants, engaged as they are in the business of aviation, can readily transport witnesses anywhere in the country with little heed to fare expense. See *Bush v. United Airlines, supra.*

VI. The Instant Cases Are Clearly Distinct From Those Pending in Massachusetts.

In the statement of facts of this case we have alluded to the distinct grouping of the cases affecting the victims

8. Affidavit of Milton M. Borowsky, Supplemental Appendix C.

9. Affidavits of Thelma Freeman, Mary B. Grice, Edna E. Long and Laura R. Manney, and Dorothy Weinstein, Supplemental Appendix D.

of the air crash which are pending in the State of Massachusetts as opposed to the instant cases. On the one hand the victims were domiciled in the State of Massachusetts; their dependents and next of kin reside there; the contract of transportation was entered into in Massachusetts; the transportation was to commence there, and if not a round trip flight, was to terminate at some point outside of their home jurisdiction.

. . . On the other hand, a large portion of the passenger quota involves victims, and their dependents and next of kin domiciled in Pennsylvania, and contracts for transportation made in Pennsylvania for a flight which began and was intended to end in that state.

There is no sound reason to deny to each distinct group of victims access to their native jurisdictions to determine the rights and liabilities of the parties. In the light of the catastrophe and large number of victims involved, we submit trial in the two forums is the only equitable and economical solution to achieve justice for all the parties.

CONCLUSION.

Petitioners' application for writ of certiorari should be denied because: (1) The significant points of contact distinctly set apart these actions from those brought in Boston which for the most part involve victims domiciled in Massachusetts who boarded the aircraft for an initial flight to points south of Boston. (2) The decisions of *Pearson v. Northeast Airlines, supra,* and *Kilberg v. Northeast Airlines, supra,* disclose a current trend in conflicts of law allowing the domiciliary forum to refuse enforcement of the penal provision of the Massachusetts Death Statute. (3) The decision as to the faith and credit to be accorded the Massachusetts Death Statute should be made by a forum concerned with the policy it shall choose to adopt towards its domiciliaries and not a forum in the state under whose public policy such a statute was enacted.

(4) A jury in the transferee forum, barred from awarding adequate damages to its own domiciliaries, could not be expected to render adequate and just awards to the plaintiffs even if the transferee jurisdiction should determine that the Pennsylvania rule of compensatory damages applied to the plaintiffs. (5) Bearing in mind the multifarious nature of the issues of liability as it affects all of the defendants, there is absent any substantial advantage, from the standpoint of the location of the witnesses, to a trial in Boston over one in Philadelphia, and the plaintiffs' choice of forum should not be disturbed, especially where it is their home, residence and domicile. (6) Any advantage which might obtain from a consolidation of these cases with those pending in Boston is of no consequence when measured against the prejudice and irreparable loss of valuable rights which the respondents would suffer by the transfer.

Respectfully submitted,

ABRAHAM E. FREEDMAN,
MILTON M. BOROWSKY,
MORRIS S. FINKEL,
FREEDMAN, LANDY & LORRY,
Attorneys for Respondents.

SUPPLEMENTAL APPENDIX "A".

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,994

BARRACK, ET AL.,
Petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13,997

POPKIN, ET AL.,
Petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,003

RAPP, ADMINISTRATOR, ET AL.,
Petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,011

BIERNBAUM, ET AL., EXECUTORS, ETC.,
Petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,033

LAISTER, EXECUTRIX, ETC., ET AL.,
Petitioners

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

Present: STALEY and FORMAN, *Circuit Judges*, and LANE, *District Judge*.

It is ORDERED that the last paragraph on page 7 and concluding on page 8 of the opinion of this Court filed November 19, 1962, which reads:

"What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Subsequently, counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. Thus, with respect to these three

suits, the district court's order of transfer was proper and will not be set aside."

be and it hereby is amended to read as follows:

What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Thus, with respect to these suits the district court's order of transfer was proper and will not be set aside. Subsequently counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. With respect to these suits, therefore, we do not pass upon the question whether the district court's order of transfer was proper since it is not contested here.

By THE COURT

STALEY
Circuit Judge

Dated: February 21, 1963

SUPPLEMENTAL APPENDIX "B".

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

DIANE BRAFF, Administratrix ad Prosequendum and as General Administratrix of the Estate of BERNARD JAY BRAFF, Deceased *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 29884
THELMA P. FREEMAN and PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Co-Executors of the Estate of ADDISON B. FREEMAN, JR., Deceased *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 30301
MARY B. GRICE, Executrix of the Estate of DAVID S. GRICE, Deceased *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION. and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 29882

EDNA E. LONG and LAURA MANNEY, Administratrices of the Estate of SHIRLEY E. REITZ, Deceased *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 29881
SIDNEY W. POPKIN *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 28664
JOSEPH THOMPSON, JR., Administrator of the Estate of LETHA MAE THOMPSON, Deceased *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 30344
DOROTHY WEINSTEIN, Executrix of the Estate of RALPH WEINSTEIN, Deceased *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 29883

ATTILIO E. ABATE, Administrator of the Estate of FREDERICK N. ABATE, Deceased *v.* EASTERN AIRLINES, INC., GENERAL MOTORS CORPORATION and LOCKHEED AIRCRAFT CORPORATION	Civil Action No. 30300
THELMA P. FREEMAN and PROVIDENT TRADESMENS BANK AND TRUST COMPANY, Co-Executors of the Estate of ADDISON B. FREEMAN, JR., Deceased *v.* UNITED STATES OF AMERICA	Civil Action No. 30306
MARY B. GRICE, Executrix of the Estate of DAVID S. GRICE, Deceased *v.* UNITED STATES OF AMERICA	Civil Action No. 30302
SIDNEY W. POPKIN *v.* UNITED STATES OF AMERICA *v.* EASTERN AIRLINES, INC.	Civil Action No. 29901
JOSEPH THOMPSON, JR., Administrator of the Estate of LETHA MAE THOMPSON, Deceased *v.* UNITED STATES OF AMERICA	Civil Action No. 30343

DOROTHY WEINSTEIN, Executrix of the Estate of RALPH WEINSTEIN, Deceased *v.* UNITED STATES OF AMERICA	Civil Action No. 30305
EDNA E. LONG and LAURA MANNEY, Administratrices of the Estate of SHIRLEY E. REITZ, Deceased *v.* UNITED STATES OF AMERICA	Civil Action No. 30303
DIANE BRAFF, Administratrix ad Prosequendum and as General Administratrix of the Estate of BERNARD JAY BRAFF, Deceased *v.* UNITED STATES OF AMERICA	Civil Action No. 30304
ATTILIO E. ABATE, Administrator of the Estate of FREDERICK N. ABATE, Deceased *v.* UNITED STATES OF AMERICA	Civil Action No. 30307

PLAINTIFF'S ANSWER TO MOTION FOR CHANGE OF VENUE PURSUANT TO 28 U. S. C. A., SEC. 1404(A).

1. The instant action asserts a right to recover against the above-named defendants for negligence, breach of contract of safe carriage and breach of warranties, the alleged violations of which took place at various situ outside of the place where the crash occurred. As to the defendants, General Motors Corporation and Lockheed Corporation, none of the alleged acts or omissions of negligence and breaches

of warranties originated in Boston, Massachusetts; as to Eastern Airlines and the United States of America, some but not all of the acts and omissions of negligence and alleged breaches of contracts and warranties occurred in Massachusetts.

2. The instant action likewise involves a contract for return transportation by air, which contract was entered into in the Commonwealth of Pennsylvania and is to be interpreted and construed in accordance with the laws of the said Commonwealth.

3. This Court has undisputed jurisdiction over the parties and the subject matter, although the United States has objected to venue in regards to three of the plaintiffs.

4. The eyewitness accounts of the occurrence in this case is of relatively minor importance. There can be no serious dispute as to the course, altitude, attitude and manner of the flight of the aircraft after take-off until its crash into the Boston Harbor.

The expert witnesses who examined the aircraft following the crash and investigated the various phases of the mishap are practically all non-residents of the State of Massachusetts. Those who were employed by the United States may testify solely through depositions (14 C. F. R., Part 311(c)); the other parties to the investigation were as follows:

F. H. Steuber, Allison Division, Indianapolis, Indiana;
Richard T. Burris, Lockheed, Burbank, California;
Jack Real, Lockheed, Burbank, California;
William R. Howard, Eastern, 10 Rockefeller Plaza, New York City.

The non-governmental representatives of the witness group were:

Gene Van Cleve, Allison Division, Indianapolis, Indiana;
John A. Margwarth, Lockheed, Burbank, California;
Neil Mangold, Eastern, Boston, Massachusetts.

In addition to eyewitnesses and experts (exclusive of those who examined the birds, all but one of whom resided in Massachusetts, and such witnesses who had tended the aircraft and/or runway), the following witnesses testified at the CAB Hearing:

Warner Ely, Van Nuys, California:
Jack Real, El Marino, La Crescenta, California;
C. R. Mercer, Burbank, California;
William Stephens, Elmhurst, New York;
David G. Howe, Miami Springs, Florida;
Captain Frank Kearn, Coral Gables, Florida;
John W. Cobb, Miami, Florida;
James F. Byrne, Boston, Massachusetts;
Eugene E. Ervin, Indianapolis, Indiana;
Robert W. Hicks, Allison, Indianapolis, Indiana;
John M. Holland, Miami, Florida.

In addition to the above-named the following occupants of the plane survived and are presumably available as witnesses:

Arthur Glick, Philadelphia, Pennsylvania;
Harold Hewell, Greenville, South Carolina;
Major Sylvester Koenig, Greenville, South Carolina;
Richard Nix, Sudbury, Massachusetts;
Albert Nordin, East Bridgewater, Massachusetts;
Dudley A. Ward, Wallingford, Pennsylvania;
James Reid, Groton, Massachusetts;
Joan Berry, Prentiss, Mississippi;
Patricia Davies, Jacksonville, Florida;
Sidney Popkin, Bristol, Pennsylvania.

5. The dependents and the next of kin of the decedent reside in the Eastern District of Pennsylvania.*

6. The business and professional associates of the decedent are residents of the Eastern District of Pennsylvania.

7. The defendants have the financial ability to bring witnesses into this district without it assuming onerous proportions. The financial burden on the plaintiffs, on the other hand, to produce witnesses in Massachusetts would be extremely harsh and burdensome.

8. The fact that an early trial date may obtain in Massachusetts militates against the interests of the plaintiff in this particular case and makes transfer unnecessary and injust. Due to the complexity of the factual issues involved in this relating to design, construction and instrumentation of the aircraft and its mechanical parts, the plaintiff requires an opportunity for full and adequate discovery, which, of necessity, will require a substantial amount of time. The court may take cognizance that more than six months' delay already has occurred between filing the first set of interrogatories and obtaining answers thereto from the defendant General Motors Corporation in the case of Pdpkin v. Eastern Airlines, et al., Civil Action No. 28664, and despite this delay, the sufficiency of the answers to many of the interrogatories is now before this Court. Therefore, to require the plaintiff to proceed to trial without adequate discovery would obviously benefit the defendants and irreparably prejudice the rights of the plaintiff. Under these circumstances, therefore, the fact that a case may be

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* Diane Braff, mother of Bernard Jay Braff, resides in Camden, New Jersey, and her deceased son was employed in Pennsauken, New Jersey.

The decedent Shirley Reitz resided in Havertown, Delaware County, and was trained and employed in and about Philadelphia and Delaware Counties.

The decedent Frederick N. Abate resided and was educated in Massachusetts, where his next of kin reside.

expected to reach trial within 18 months after issue in Massachusetts is not in the interest of the plaintiff, nor does it serve the ends of justice.

9. The Death Statute of Massachusetts, applicable to a case such as this, does not allow recovery for compensatory damages. It is wholly punitive in nature, and the maximum amount recoverable is $20,000. The punitive features of this statute and the limitation on the amount of recovery is not recognized by the United States of America with respect to its liability under the Federal Tort Claims Act. However, as to the other defendants herein, whether or not the punitive features and limitations of the statute will be followed or ejected will depend upon the policy of comity in the light of recent decisions affecting interstate transportation by air as construed by the state of the domicile of the decedent and of his dependents and next of kin; by the state in which the contract of carriage originated. This construction will be made by the forum in which the case is tried. The transfer of this case to Massachusetts would, for all practical purposes, deprive the plaintiff of an opportunity to have these rights determined by a proper tribunal in view of the declared policy of Massachusetts evident by the said statute, and relegate him to a grossly inadequate redress solely by reason of the fortuitous locale of the tort.

FREEDMAN, LANDY AND LORRY,

By MILTON M. BOROWSKY,

Attorneys for Plaintiff.

SUPPLEMENTAL APPENDIX "C".

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.*:

MILTON M. BOROWSKY, being duly sworn according to law, does hereby depose and state that he is counsel for the plaintiffs; that he has had occasion to visit, and use as a passenger, the facilities of the Logan International Airport in Boston, Massachusetts, since the date of the subject air crash, to wit, October 4, 1960; that he personally knows and has information that extensive changes and reconstruction have been done to the runways and aprons of the runways used by jet planes at the said airport; that the taxiway to the Eastern Airlines hangar has been reconstructed since the aforesaid date, that partial reference to these alterations appear in the City Record, Official Chronicle of Boston Massachusetts Affairs, Vol. 53, No. 9, at p. 153, dated March 4, 1961; that he inspected the wreckage of the said aircraft at Hingham, Massachusetts, on April 29, 1961, at which time he was advised that on or about the following day the said wreckage would be removed and the remnants disposed of; that through representatives who inspected the remains of the disassembly of the four turbo-prop engines on June 26, 1961, following an order of this Court, which was accomplished at the LaGuardia Airport, deponent has been advised, and therefore states, that the four engines and propellers which had been shipped to the Allison Division, General Motors Corporation, after the crash, for examination and testing, were, on the said date of June 26, 1961 completely disassembled and their component part intermingled so as to frustrate

any reasonable inspection of the engines or the parts relevant to any specific engine.

MILTON M. BOROWSKY

Sworn to and subscribed before me this 11th day of December, 1961.

/s/ SYLVIA GLASSMAN,
Sylvia Glassman,
Notary Public.
Philadelphia, Philadelphia Co.
My commission expires January 25, 1965.

SUPPLEMENTAL APPENDIX "D".

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF DELAWARE } *ss.:*

THELMA P. FREEMAN, being duly sworn according to law, does hereby depose and state that she is a citizen and resident of Delaware County, Commonwealth of Pennsylvania, and, together with Provident Tradesmens Bank and Trust Company, a corporation duly organized and existing under and by virtue of the laws of the Commonwealth of Pennsylvania, has been appointed co-executor of the estate of her husband, Addison B. Freeman, Jr., deceased, having been appointed by the Register of Wills of Delaware County, Commonwealth of Pennsylvania, and she avers, on information and belief, that said Addison B. Freeman, Jr., purchased round-trip transportation by air from Philadelphia to Boston prior to October 4, 1960, and that on the aforesaid date he boarded a certain Lockheed Electra airplane bearing Registration No. N5533 at the Logan International Airport in Boston for the return flight to Philadelphia; upon information and belief she avers that shortly after the aircraft had become airborne, following take-off from the said airport, said aircraft crashed into the navigable waters of Boston Harbor, causing Addison B. Freeman, Jr. to suffer severe and disabling injuries resulting in his death; upon information and belief deponent avers that almost all of the witnesses concerning the habits, hobbies, avocations, business activities, ability and earning capacity, intellectual and financial achievements, and state of health up to the time of his death, including the members of his family, friends, physicians, employees and business associates, are persons residing in and about Philadelphia and/or Delaware Counties of Pennsylvania; upon information and belief deponent avers that trial of the instant cause in Boston, Massachusetts, would be a great expense and inconvenience to the deponent, precluding the production

of witnesses at the trial to establish properly the true nature and extent of the losses caused by reason of the aforesaid occurrence to the great detriment of the dependents and next of kin of Addison B. Freeman, Jr.; that upon information and belief deponent avers that it will take a long period of time to uncover the necessary facts to establish negligence of the defendants in the operation of the airport, dispatch and operation of the aircraft and the defects in its design, assembly, furnishings, construction, equipment, instrumentation and maintenance, and with knowledge of that fact deponent avers contentment with and a desire for the passage of time necessary to fully develop the facts, rather than proceeding to trial before the said facts have been fully uncovered, assembled and studied in order to obtain a premature disposition of deponent's claim which would prejudice deponent's right therein; deponent avers faith and confidence in deponent's attorneys, Messrs. Freedman, Landy and Lorry, of Philadelphia, whom deponent has chosen as the direct and exclusive representative in the prosecution of deponent's claim; deponent further avers, upon information and belief, that trial of the instant cause in Boston, Massachusetts, would prejudice the rights of decedent's dependents and next of kin, as there would result a deprivation of the opportunity to have litigated in this forum the unsettled question of law whether the limitation on amount of recovery contained in the Massachusetts Wrongful Death Statute should be applied to domiciliaries of Pennsylvania and those who contracted for their passage by air in Pennsylvania, due solely to the fortuitous locale of the crash in Massachusetts, or whether the Federal Court should apply the Pennsylvania law which prescribes no such limitation; in this regard, deponent further avers, upon information and belief, that to apply the aforesaid Massachusetts limitation would violate the public policies expressed in the statutes, judicial decisions and Constitution of the Commonwealth of Pennsylvania and of the United States, would ignore the

real and important interests of Pennsylvania in this matter, and would unfairly and inadequately recompense the dependents and next of kin of Addison B. Freeman, Jr., while to transfer the trial to Boston, Massachusetts, would not in any adequate measure raise this crucial question for disposition which deponent avers is paramount over any inconvenience that may be suffered by the defendants in the instant cause.

/s/ THELMA FREEMAN

Sworn to and subscribed before me this 8th day of December, 1961.

/s/ P. LESTELLA MELORUM,
Notary Public.
Philadelphia, Philadelphia Co.
My commission expires May 20, 1962.

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF MONTGOMERY } *ss.:*

MARY B. GRICE, being duly sworn according to law, does hereby depose and state that she is a citizen and resident of Montgomery County, Commonwealth of Pennsylvania, and has been appointed executrix of the estate of her husband, David S. Grice, deceased, by the Register of Wills of Montgomery County, Commonwealth of Pennsylvania, and she avers, on information and belief, that said David S. Grice purchased round-trip transportation by air from Philadelphia to Boston prior to October 4, 1960, and that on the aforesaid date he boarded a certain Lockheed Electra airplane bearing Registration No. N5533 at the Logan International Airport in Boston for the return flight to Philadelphia; upon information and belief she avers that shortly after the aircraft had become airborne, following take-off from the said airport, said aircraft crashed into the navigable waters of Boston Harbor, causing David S. Grice to suffer severe and disabling injuries resulting in his death; upon information and belief deponent avers that almost all of the witnesses concerning the habits, hobbies, avocations, business activities, ability and earning capacity, intellectual and financial achievements, and state of health up to the time of his death, including the members of his family, friends, physicians, employees and business associates, are persons residing in and about Philadelphia and/or Montgomery Counties of Pennsylvania; upon information and belief deponent avers that trial of the instant cause in Boston, Massachusetts, would be a great expense and inconvenience to the deponent, precluding the production of witnesses at the trial to establish properly the true nature and extent of the losses caused by reason of the aforesaid occurrence to the great detriment of the dependents and next of kin of David S. Grice; that upon information and belief deponent avers that it will take a long period of time

to uncover the necessary facts to establish negligence of the defendants in the operation of the airport, dispatch and operation of the aircraft and the defects in its design, assembly, furnishings, construction, equipment, instrumentation and maintenance, and with knowledge of that fact deponent avers contentment with and a desire for the passage of time necessary to fully develop the facts, rather than proceeding to trial before the said facts have been fully uncovered, assembled and studied in order to obtain a premature disposition of deponent's claim which would prejudice deponent's right therein; deponent avers faith and confidence in deponent's attorneys, Messrs. Freedman, Landy and Lorry, of Philadelphia, whom deponent has chosen as the direct and exclusive representative in the prosecution of deponent's claim; deponent further avers, upon information and belief, that trial of the instant cause in Boston, Massachusetts, would prejudice the rights of decedent's dependents and next of kin, as there would result a deprivation of the opportunity to have litigated in this forum the unsettled question of law whether the limitation on amount of recovery contained in the Massachusetts Wrongful Death Statute should be applied to domiciliaries of Pennsylvania and those who contracted for their passage by air in Pennsylvania, due solely to the fortuitous locale of the crash in Massachusetts, or whether the Federal Court should appiy the Pennsylvania law which prescribes no such limitation; in this regard, deponent further avers, upon information and belief, that to apply the aforesaid Massachusetts limitation would violate the public policies expressed in the statutes, judicial decisions and Constitution of the Commonwealth of Pennsylvania and of the United States, would ignore the real and important interests of Pennsylvania in this matter, and would unfairly and inadequately recompense the dependents and next of kin of David S. Grice, while to transfer the trial to Boston, Massachusetts, would not in any adequate measure raise this

crucial question for disposition, which deponent avers is paramount over any inconvenience that may be suffered by the defendants in the instant cause.

/s/ MARY B. GRICE

Sworn to and subscribed before me this 8th day of December, 1961.

/s/ GEO. J. YOUNGFLEISH,
Notary Public.
Philadelphia, Philadelphia Co.
My commission expires February 1, 1965.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF NORTHUMBERLAND } *ss.:*

EDNA E. LONG and LAURA MANNEY, being duly sworn according to law, do hereby depose and state that they are citizens and residents of Elysburg and Shamokin, County of Northumberland, Pennsylvania, respectively, and have been duly appointed administratrices of the estate of Shirley E. Reitz, deceased, by the Register of Wills of Delaware County, Commonwealth of Pennsylvania, and they aver, on information and belief, that said Shirley E. Reitz purchased round-trip transportation by air from Philadelphia to Boston prior to October 4, 1960, and that on the aforesaid date she boarded a certain Lockheed Electra airplane bearing Registration No. N5533 at the Logan International Airport in Boston for the return flight to Philadelphia; upon information and belief they aver that shortly after the aircraft had become airborne, following take-off from the said airport, said aircraft crashed into the navigable waters of Boston Harbor, causing Shirley E. Reitz to suffer severe and disabling injuries resulting in her death; upon information and belief deponents aver that almost all the witnesses concerning the habits, hobbies, avocations, business activities, ability and earning capacity, intellectual and financial achievements, and state of health up to the time of her death, including the members of her family, friends, physicians, employees and business associates, are persons residing in and about Philadelphia, Delaware and/or Northumberland Counties of Pennsylvania; upon information and belief deponents aver that trial of the instant cause in Boston, Massachusetts, would be a great expense and inconvenience to the deponents, precluding the production of witnesses at the trial to establish properly the true nature and extent of the losses caused by reason of the aforesaid occurrence to the great detriment of the dependents and next of kin of Shirley E. Reitz; that upon information and belief

deponents aver that it will take a long period of time to uncover the necessary facts to establish negligence of the defendants in the operation of the airport, dispatch and operation of the aircraft and the defects in its design assembly, furnishings, construction, equipment, instrumentation and maintenance, and with knowledge of that fact deponents aver contentment with and a desire for the passage of time necessary to fully develop the facts, rather than proceeding to trial before the said facts have been fully uncovered, assembled and studied in order to obtain a premature disposition of deponents' claim which would prejudice deponents' right therein; deponents aver faith and confidence in deponents' attorneys, Messrs. Freedman, Landy and Lorry, of Philadelphia, whom deponents have chosen as the direct and exclusive representative in the prosecution of deponents' claim; deponents further aver, upon information and belief, that trial of the instant cause in Boston, Massachusetts, would prejudice the rights of decedent's dependents and next of kin, as there would result a deprivation of the opportunity to have litigated in this forum the unsettled question of law whether the limitation on amount of recovery contained in the Massachusetts Wrongful Death Statute should be applied to domiciliaries of Pennsylvania and those who contracted for their passage by air in Pennsylvania, due solely to the fortuitous locale of the crash in Massachusetts, or whether the Federal Court should apply the Pennsylvania law which prescribes no such limitation; in this regard, deponents further aver, upon information and belief, that to apply the aforesaid Massachusetts limitation would violate the public policies expressed in the statutes, judicial decisions and Constitution of the Commonwealth of Pennsylvania and of the United States, would ignore the real and important interests of Pennsylvania in this matter, and would unfairly and inadequately recompense the dependents and next of kin of Shirley E. Reitz, while to transfer the trial to Boston, Massachusetts, would not in any adequate

measure raise this crucial question of disposition, which deponents aver is paramount over any inconvenience that may be suffered by the defendants in the instant cause.

/s/ EDNA E. LONG
/s/ LAURA R. MANNEY

Sworn to and subscribed before me this 8th day of December, 1961.

/s/ KATHERINE KALODY,
Notary Public.
Philadelphia, Philadelphia Co.
My commission expires February 28, 1965.

COMMONWEALTH OF PENNSYLVANIA }
COUNTY OF PHILADELPHIA } *ss.:*

DOROTHY WEINSTEIN, being duly sworn according to law, does hereby depose and state that she is a *citizen and resident of Philadelphia County, Commonwealth of Pennsylvania,* and has been duly appointed executrix of the estate of her husband, Ralph Weinstein, deceased, by the Register of Wills of Philadelphia County, Commonwealth of Pennsylvania, and she avers, on information and belief, that said Ralph Weinstein purchased round-trip transportation by air from Philadelphia to Boston prior to October 4, 1960, and that on the aforesaid date he boarded a certain Lockheed Electra airplane bearing Registration No. N5533 at the Logan International Airport in Boston for the return flight to Philadelphia; upon information and belief she avers that shortly after the aircraft had become airborne, following take-off from the said airport, said aircraft crashed into the navigable waters of Boston Harbor, causing Ralph Weinstein to suffer severe and disabling injuries resulting in his death; upon information and belief deponent avers that almost all of the witnesses concerning the habits, hobbies, avocations, business activities, ability and earning capacity, intellectual and financial achievements, and state of health up to the time of his death, including the members of his family, friends, physicians, employees and business associates, are persons residing in and about Philadelphia County of Pennsylvania; upon information and belief deponent avers that trial of the instant cause in Boston, Massachusetts, would be a great expense and inconvenience to the deponent, precluding the production of witnesses at the trial to establish properly the true nature and extent of the losses caused by reason of the aforesaid occurrence to the great detriment of the dependents and next of kin of Ralph Weinstein; that upon information and belief deponent avers

that it will take a long period of time to uncover the necessary facts to establish negligence of the defendants in the operation of the airport, dispatch and operation of the aircraft and the defects in its design, assembly, furnishings, construction, equipment, instrumentation and maintenance, and with knowledge of that fact deponent avers contentment with and a desire for the passage of time necessary to fully develop the facts, rather than proceeding to trial before the said facts have been fully uncovered, assembled and studied in order to obtain a premature disposition of deponent's claim which would prejudice deponent's right therein; deponent avers faith and confidence in deponent's attorneys, Messrs. Freedman, Landy and Lorry, of Philadelphia, whom deponent has chosen as the direct and exclusive representative in the prosecution of deponent's claim; deponent further avers, upon information and belief, that trial of the instant cause in Boston, Massachusetts, would prejudice the rights of decedent's dependents and next of kin, as there would result a deprivation of the opportunity to have litigated in this forum the unsettled question of law whether the limitation on amount of recovery contained in the Massachusetts Wrongful Death Statute should be applied to domiciliaries of Pennsylvania and those who contracted for their passage by air in Pennsylvania, due solely to the fortuitous locale of the crash in Massachusetts, or whether the Federal Court should apply the Pennsylvania law which prescribes no such limitation; in this regard, deponent further avers, upon information and belief, that to apply the aforesaid Massachusetts limitation would violate the public policies expressed in the statutes, judicial decisions and Constitution of the Commonwealth of Pennsylvania and of the United States, would ignore the real and important interests of Pennsylvania in this matter, and would unfairly and inadequately recompense the dependents and next of kin of Ralph Weinstein, while to transfer the trial to Boston, Massachusetts, would not in any adequate measure

raise this crucial question for disposition, which deponent avers is paramount over any inconvenience that may be suffered by the defendants in the instant cause.

/s/ DOROTHY WEINSTEIN

Sworn to and subscribed before me this 4th day of December, 1961.

/s/ SYLVIA GLASSMAN,
Notary Public.
Philadelphia, Philadelphia Co.
My commission expires January 25, 1965.

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IN THE

Supreme Court of the United States

October Term, 1962

56 ——— 80

No. ~~[illegible]~~ and No. ~~807.~~

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, EASTERN AIRLINES, INC., LOCKHEED AIRCRAFT CORPORATION and GENERAL MOTORS CORPORATION,

and

THE UNITED STATES OF AMERICA,
Petitioners,

v.

ROBERTA BARRACK, Admx., Etc., Et Al. (No. 13994),
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF FOR RESPONDENTS ROBERTA BARRACK, ADMX., ETC., ET AL., IN OPPOSITION.

ELWOOD S. LEVY,
DAVID F. BINDER,
Attorneys for Respondents Roberta Barrack, Admx., Etc., et al. (No. 13994).

Of Counsel:
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121 South Broad Street,
Philadelphia 7, Pennsylvania.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962.

No. 738 and No. 851.

FRANCIS L. VAN DUSEN, UNITED STATES DISTRICT JUDGE, ET AL.,

Petitioners,

v.

ROBERTA BARRACK, ADMINISTRATRIX, ETC., ET AL.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR RESPONDENTS, ROBERTA BARRACK, ADMX., ETC., ET AL. (NO. 13994), IN OPPOSITION.*

OPINIONS BELOW.

The opinion of District Judge Van Dusen is adequately set forth in the petitions (No. 738 and No. 851, this Term). The opinion of the Court of Appeals filed November 19, 1962 and reported at 309 F. 2d 953 *sub nom. Barrack v. Van Dusen* is adequately set forth in both petitions *except* for an amendment (as yet unreported) by order dated February 21, 1963, to correct a manifest inadvertency therein; the order and amendment of the opinion are printed in Appendix B to this Brief in Opposition.

* This Brief in Opposition is filed on behalf of those plaintiffs who were Petitioners for Writ of Mandamus or Prohibition under No. 13994 in the United States Court of Appeals for the Third Circuit as listed in Appendix A, *infra*, pp. 1b-2b.

JURISDICTION.

The jurisdictional requisites are adequately set forth in the petitions.

QUESTIONS PRESENTED.

1. Is the Massachusetts District Court a court where these death actions "might have been brought" within the meaning of § 1404(a) of the Judicial Code, where all of the fiduciary plaintiffs there lacked capacity to sue as a matter of right except by the wish, waiver or consent of the defendants?

2. Where plaintiffs properly institute death actions in their home forum against defendants there engaged in business, can transfer be "in the interest of justice" where its effect is to emasculate the plaintiffs' claims by substituting a harsh and penal limitation on damages in violation of the strong public policy of the forum state?

3. Where domiciliaries of the Eastern District of Pennsylvania, who are personal representatives appointed by appropriate state courts situate in that District, bring suit in that District to recover damages for the wrongful death of domiciliaries of that same District and all beneficiaries therein reside and all defendants are there engaged in business, does not transfer to a distant district constitute a clear abuse of discretion, where such transfer results in radical emasculation of the measure of damages to the detriment of the parties opposing transfer?

STATUTE INVOLVED.

62 Stat. 937, 28 U. S. C. § 1404(a), is set forth in both petitions.

STATEMENT.

On October 4, 1960, an Electra airplane manufactured by Lockheed, having engines made by General Motors, and owned and operated by Eastern Air Lines, Inc., crashed immediately after take-off from Logan Airport, Boston, Massachusetts, on a scheduled non-stop flight to Philadelphia. Aboard were sixty-seven passengers and a crew of five, of whom fifty-seven passengers and three crew members were fatally injured.

This Brief in Opposition embraces suits filed in the United States District Court for the Eastern District of Pennsylvania by the personal representatives of nine deceased passengers against the three named corporate defendants; separate suits on the same claims were instituted against the United States under the Federal Tort Claims Act. There are therefore eighteen cases pending within No. 13994.[1] The gravamen of the claims is that the negligence of the four defendants caused the crash.

All of these decedents were domiciliaries of the Eastern District of Pennsylvania. All of the personal representative plaintiffs are domiciliaries of the Eastern District of Pennsylvania. All were appointed by Pennsylvania courts; none received any letters of administration from any probate court of Massachusetts and none are or have ever qualified as personal representatives in that state. All of the survivors entitled to benefit from the wrongful death actions are domiciliaries of the Eastern District of Pennsylvania. All of the corporate defendants are engaged in business in the Eastern District of Pennsylvania.

The Massachusetts Death Act restricts damages to a "sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the de-

1. Forty-nine other actions have been instituted by other plaintiffs in the United States District Court for the Eastern District of Pennsylvania for deaths and injuries arising from the same crash.

gree of . . . culpability" (Mass. Ann. Laws, c. 229 § 2c); it was held by this Court to be a punitive statute. *Massachusetts Bonding & Ins. Co. v. United States*, 352 U. S. 128 (1956).

However, the Pennsylvania Constitution (Article III, § 21) prohibits (except for workmen's compensation laws) any limitation on the amount of damages to be recovered for injuries resulting in death. Pennsylvania case law refuses to enforce foreign penal statutes, even when they are remedial in nature.

Nevertheless, and over plaintiffs' objections, defendants' motions for transfer under 28 U. S. C. § 1404(a) to the United States District Court for the District of Massachusetts (Boston) were granted by the Honorable Francis L. Van Dusen, District Judge, for the "convenience" of parties and witnesses and "in the interest of justice" (District Court Opinion, App. in No. 738, p. 21a; App. in No. 851, p. 22a).

On petitions for writs of mandamus and prohibition, plaintiffs contended (1) that the District Judge was without power to enter the order of transfer because the Massachusetts District Court is not a district where these death actions "might have been brought" within the meaning of § 1404(a), (2) that transfer should be vacated as a matter of law because the transferee court would apply a penal limitation of damages to the prejudice of the parties opposing it and in violation of the strong public policy of the forum, and (3) that the order of transfer constituted a clear abuse of discretion.

The Court of Appeals held that the District Judge was without power to enter the order of transfer for the reason that under the Federal Rules of Civil Procedure and Massachusetts law, the plaintiffs lacked capacity to sue in the Massachusetts courts and that the District Court of that state was therefore not a district where these suits "might have been brought" within the meaning of 28 U. S. C. § 1404(a) as defined in *Hoffman v. Blaski*, 363 U. S. 335

(1960). Having so ruled, the Court of Appeals found it unnecessary to consider plaintiffs' two remaining alternative arguments.[2]

There followed the petition for writ of certiorari by the corporate defendants (No. 738, this Term) and a separate petition by the government (No. 851, this Term). This brief is submitted in opposition to both petitions.

SUMMARY OF ARGUMENT.

The opinion of the Court of Appeals is correct for the reasons stated therein. Under Massachusetts law the plaintiffs in these death actions have no capacity to sue in that Commonwealth; any such suit would be dismissed if this defense were not waived by the defendants. Under F. R. C. P. No. 17(b), capacity to sue in the federal courts is determined by reference to state law. The Court of Appeals properly followed this Court's opinion in *Hoffman v. Blaski*, 363 U. S. 335, which holds that a proposed transferee district is not one in which an action "might have been brought" under § 1404(a) if suit there could not originally have been instituted and maintained by the plaintiffs independently of the wish or waiver of the defendant.

The decision of the Court of Appeals is correct on two additional grounds.

The real reason that the defendants wish to transfer the within death actions is to avail themselves of the harsh penal limitation on damages in death cases obtaining in Massachusetts. Pennsylvania, the home forum of these plaintiffs and their decedents, would not enforce the Massachusetts penal limitation because it is contrary to the strong

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2. Defendants in No. 738, this Term, in referring to the findings of the District Judge in support of transfer assert (p. 5): "In issuing the writ the Court of Appeals did not dispute these findings." In fact, the Court of Appeals expressly found it unnecessary to consider them (App. in No. 738, p. 24a; App. in No. 851, p. 28a).

public policy of Pennsylvania. Thus, transfer would emasculate the plaintiffs' damages.

The District Court's order of transfer constitutes a clear abuse of discretion for many reasons, among which are: (1) Pennsylvania has by far the greatest number and the most important contacts with this case and the parties thereto, (2) the weight of the evidence does not show that any substantial convenience to parties or witnesses would be served by transfer, (3) the so-called convenience of the parties and witnesses and prospective consolidation with other cases cannot possibly overbalance the severe hardship to plaintiffs which would be caused by trial in a distant forum and by the substitution of a harshly punitive limitation for full compensatory damages, (4) the District Court gave great weight to many irrelevant and improper considerations.

This case will have no substantial effect on other litigation. Defendant's contention to the contrary is illusory. Only one other reported case in the country has dealt with the issue here resolved by the Court of Appeals; these two opinions are in harmony inter se and with all other federal decisions. This case is also ad hoc because it involves a penal limitation on damages in death actions, and such penal limitations exist in only two states in the Union.

No compelling reason for the grant of certiorari exists and the defendants' petitions should be denied.

ARGUMENT.

In seeking review, the defendants urge as an internal inconsistency in the Court of Appeals' opinion what in fact was a manifest inadvertency relating to two cases not here involved (No. 738 at pp. 3-4, 11; No. 751, p. 7, n. 5, p. 12, n. 11). This is invoked by defendants as rising to error of law bringing § 1404(a) into collision with § 1406(a). However, the Court of Appeals' opinion was corrected by amendment entered February 21, 1963 which mooted the point (App. B, *infra*, pp. 3b-5b). These plaintiffs therefore make no further response to defendants' assertions on this subject.

I. The Opinion of the Court of Appeals Is Correct for the Reasons Stated Therein.

The Court of Appeals held that a district court has no power to transfer wrongful death actions to a district in which the plaintiffs have no capacity to sue. The Court's opinion relied upon and followed the opinion of this Court in *Hoffman v. Blaski*, 363 U. S. 335.

These cases were brought in a federal court in Pennsylvania in the district of their residence by Pennsylvanians as Pennsylvania fiduciaries of and for Pennsylvania decedents and their survivors.

Under Rule 17(b) of the Federal Rules of Civil Procedure, the capacity of a representative party to sue is to be determined by state law: ". . . capacity to sue or be sued shall be determined by the law of the state in which the district court is held . . .".

Under Massachusetts law a personal representative appointed in another jurisdiction is not thereby qualified to maintain an action in the Massachusetts courts; if a personal representative appointed in another state brings such suit and the defendant moves to dismiss, the motion must be granted: *Boutillier v. Wasinger*, 322 Mass. 495, 78 N. E. 2d 195 (1948). In that case a New Hampshire administra-

trix appointed by a New Hampshire court brought suit in Massachusetts under the latter's death statute. The unanimous Supreme Judicial Court of Massachusetts (per Chief Justice Qua) held that a timely motion to dismiss would have been granted, stating (page 496):

> "It is settled in this Commonwealth that an administrator appointed in another jurisdiction is not thereby qualified to maintain an action here under our death statute."

The corporate defendants cite *Boudreau v. New England Transportation Company*, 315 Mass. 423, 53 N. E. 2d 92 (1944), for the proposition that Massachusetts is liberal in permitting a foreign fiduciary who has brought suit in Massachusetts to obtain an ancillary appointment in Massachusetts and to amend his complaint after the statute of limitations has run (pp. 10-11 of petition in No. 738). However, what the *Boudreau* case actually held was that the defendant therein by its failure timely to plead the plaintiff's lack of capacity to sue had *waived* this defense; it was for that reason alone that the Court permitted the plaintiff's amendment to show capacity by subsequent appointment in Massachusetts.

Thus, it is abundantly clear from the *Boudreau* and *Boutillier* cases that lack of capacity to sue is an affirmative defense under Massachusetts law which will defeat the action if raised but which may be waived.

In *Hoffman v. Blaski*, 363 U. S. 335, this Court held that lack of venue (an affirmative defense which, like capacity to sue, may be waived by the defendant) in the transferee district absolutely precludes transfer under § 1404(a), even though the defendant agrees to waive that defense. This is so, this Court stated, because a proposed transferee district is *not* one in which an action "might have been brought", within the meaning of § 1404(a), if suit there could not originally have been instituted and maintained by the plaintiff "independently of the wishes of the defendant". This Court stated (pp. 342-344):

"We do not think the § 1404(a) phrase 'where it might have been brought' can be interpreted to mean, as petitioners' theory would require, 'where it may now be rebrought, with defendants' consent.' . . .

". . . . The transferee courts could have acquired jurisdiction over these actions only if properly brought in those courts, or if validly transferred thereto under § 1404(a). . . . But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff. . . .

"We agree with the Seventh Circuit that:

'If when a suit is commenced, plaintiff has a right to sue in that district, *independently of the wishes of defendant*, it is a district "where [the action] might have been brought." If he does *not* have that right, independently of the wishes of defendant, it is *not* a district "where it might have been brought," and it is *immaterial* that the defendant subsequently [makes himself subject, by consent, waiver of venue and personal jurisdiction defenses *or otherwise*, to the jurisdiction of some other forum].' " (Emphasis supplied.)

The corporate defendants argue (p. 10 of petition at No. 738), but cite no cases to support such argument, that § 1404(a) should be construed to mean that a district court may transfer an action to any other district which has jurisdiction and venue over the parties. The short answer to this contention is that if Congress had intended such a result it would simply have so stated, i.e., it would have provided that any civil action could be transferred to any other district "which has jurisdiction and venue over the parties". Congress, however, did not so provide; it limited the power of a district court to transfer a civil action "to any other district or division *where it might have been*

brought" (emphasis supplied), which means, as defined in *Hoffman v. Blaski*, 363 U. S. 335, 342-344, *where it might have been brought, as a matter of independent right, with or without defendants' consent and without reference to their wish or waiver.*

The Court of Appeals pointedly and properly disposed of this contention of the petitioners as follows (App. in No. 738, pp. 26a-27a; App. in No. 851, p. 31a):

> "We think that the holding in Hoffman v. Blaski, supra, compels the conclusion that respondent was without power to transfer these actions. The import of that decision is that unless the plaintiff *had an unqualified right to bring suit* in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a). Hence, the fact that at oral argument counsel for intervenors expressed a willingness to waive any objection to petitioners' capacity to sue in Massachusetts is beside the point. Nor can the district court's statement that these actions involve the legal fiction of the appointment of a personal representative be used as a basis for distinguishing them from Hoffman v. Blaski, supra. Certainly the requirement of capacity to sue is no more a legal fiction than is the necessity for having proper venue. Obviously, it, like venue, can be waived. Rules 9(a) and 12(h), Fed. R. Civ. P. But waiver or the possibility of waiver did not alter the Supreme Court's conclusion in Hoffman. In short, we can perceive no basis in either logic or policy for making any distinction between the absence of venue in the transferee forum and a prospective plaintiff's lack of capacity to sue there."

In *New York Central Railroad Company v. United States*, 200 F. Supp. 944, 947 (S. D. N. Y., 1961), the Court, per Judge Henry J. Friendly, held that the decision in

Hoffman v. Blaski is not limited to cases of jurisdiction and venue deficiencies, stating:

> "Hoffman v. Blaski, 363 U. S. 335, 80 S. Ct. 1084, 1085, 4 L. Ed. 1254 (1960), ruled against a claim that an action 'might have been brought' in a district where a defendant seeking transfer could not have been served with process and would have had a valid venue objection, although by his motion he accepted the jurisdiction of, and forewent objection to venue in, the proposed transferee court. *We do not read the opinion as limited to cases presenting such a conjunction of jurisdiction and venue deficiencies;* it approved, p. 344, 80 S. Ct. p. 1090, the statement of the Seventh Circuit, 260 F. 2d 317, at 321, and Behimer v. Sullivan, 261 F. 2d 467, at 469, that the statutory test is met only 'If when a suit is commenced, plaintiff has a right to sue in that district, independently of the wishes of defendant.' Cf. Continental Grain Co. v. Barge FBL-585, 346 U. S. 19, 80 S. Ct. 1470, 4 L. Ed. 2d 1540 (1960)." (Emphasis supplied.)

The corporate defendants argue that the opinion of the Court of Appeals subverts the purpose of § 1404(a) "because of wholly unrelated matters of state law and of a supposed state policy" (p. 6 of petition in No. 738). They contend that by the decision below "state legislatures become the arbiters of the extent to which Acts of Congress governing procedure in federal district courts are effective" (p. 10 of petition in No. 738).

This argument is illusory. It is F. R. C. P. No. 17(b), promulgated by this Court, which requires all federal district courts to refer to the law of the state in which they sit to determine capacity to sue. What the Court of Appeals did was merely to apply a federal procedural rule which makes reference to state law mandatory. Under Rule 17 (b), how can matters of state law concerning capacity to sue be "wholly unrelated"?

Defendants also argue (pp. 6-12 of petition in No. 738, pp. 11-12 of petition in No. 851) that the decision of the Court of Appeals, following *Hoffman v. Blaski*, should be overruled because it would restrict the transfer of most actions for wrongful death, some of which arise out of airline crashes and other disasters.

This argument was ably and cogently answered by the Court of Appeals when it held (App. in No. 738, pp. 28a-29a; App. in No. 851, p. 33a):

> "Respondent and intervenors urge that the construction which petitioners seek would unduly circumscribe § 1404(a) in any action brought by a personal representative. The short answer to this is that by the use of the phrase 'where it might have been brought' Congress intended that the power to transfer should not be unqualified. That most jurisdictions do not permit foreign personal representatives to bring suit in their courts as a matter of right is a well known rule of law, and we cannot presume that Congress intended to alter state policy to the extent of permitting transfer of such suits to the federal courts sitting in those states. Indeed, as we previously noted, Rule 17 (b), Fed. R. Civ. P., requires the district court to refer to the law of the state in which it sits to determine capacity to sue. Finally, we must accept § 1404(a) as it has been construed by the Supreme Court in Hoffman v. Blaski, supra, i.e., that it permits transfer only if the plaintiff at the time of the commencement of the action had an independent right to institute suit in the transferee district."

Defendants' argument is not a sound approach to federal statutory construction. There is nothing to indicate that § 1404(a) was designed by Congress to be all-encompassing or was intended to permit the transfer of all manner of litigation with equal facility. Such, obviously, was not the intention of Congress, and was the precise reason that

Congress limited transfer to districts in which the action "might have been brought" by the plaintiff. If most of the states do not permit Pennsylvania personal representatives to bring actions as a matter of right in their state courts, it is certainly no cause for alarm that federal law should not gratuitously endow defendants with a right to transfer such actions to federal courts sitting in those states. Indeed, fairness and justice would seem to militate against any such endowment. And F. R. C. P. No. 17(b), promulgated by this Court, would prohibit it.

Moreover, there is good reason why it *should* be more difficult for the defendants to force the transfer of actions for wrongful death than it is for them to force the transfer of other types of litigation. Wrongful death actions are often cases of extreme hardship involving widows and small children and other dependents whose sole source of support has been taken from them. (This is true of most of the cases herein concerned.) It is normally a greater sacrifice for them than for most other litigants to be subjected to the rigors of lengthy travel, and to take up residence for long periods of time at distant points in order there to maintain and prosecute sustained litigation in a forum selected by the defendant as best situated to satisfy the convenience of itself and of its witnesses.

Also, the doctrine of *forum non conveniens* still exists in the federal courts, and may be utilized by any defendant to effect the dismissal of a case which has been brought arbitrarily in an improper forum. See *Hopson v. Hopson*, 221 F. 2d 839 (D. C. Cir., 1955).

The only other reported case in the country dealing with the issue here resolved by the Court of Appeals is *Felchlin v. American Smelting and Refining Company*, 136 F. Supp. 577 (S. D. Cal., 1955), which is in accord therewith (see discussion, *infra*, pp. 28-29). Section 1404(a) has been in effect since June 25, 1948. In light of the fact that there have been only two reported federal decisions dealing with this issue in the more than 14 years which

have passed since the effective date of the Act, it is difficult to accept the defendants' assertions that this case will have any massive effect upon other litigation throughout the country.

It is submitted that the statutory limitation upon transfer to districts in which the action "might have been brought", independently of the wish or waiver of the defendant (*Hoffman v. Blaski*, 363 U. S. 335), is both a sensible and desirable expression and recognition of Congressional intent. The opinion of the Court of Appeals is therefore clearly correct for the reasons therein stated.

II. The Opinion of the Court of Appeals Is Correct for Additional Reasons.

Plaintiffs additionally argued to the Court of Appeals that transfer was improper because it would result in emasculation of plaintiffs' damages, and because it constituted a clear abuse of discretion in the circumstances. The Court of Appeals expressly found it unnecessary to consider these alternative arguments. (App. in No. 738, p. 24a; App. in No. 851, p. 28a).

It is submitted that the decision of the Court of Appeals is correct and would have been required for the reasons discussed in plaintiffs' alternative arguments (summarized in subsections A and B, *infra*), regardless of the issue upon which the Court rested its decision.

A. Transfer Would Emasculate the Plaintiffs' Claims for Damages.

The real reason that the corporate defendants desire to transfer the within death cases to Massachusetts is because such transfer would substantially diminish the measure of damages to which the plaintiffs would be entitled.

Massachusetts and Alabama are the only two states in the United States having statutes imposing a penal or punitive restriction on damages for wrongful death:

Massachusetts Bonding & Insurance Co. v. United States, 352 U. S. 128, 130-131.

The General Provisions of the Massachusetts Death Act [G. L. (Ter. Ed.), c. 229, § 2C, as amended, 7A Ann. Laws of Mass. 407] provide that a person who negligently causes the death of another "shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability or that of his agents or servants." Compensatory damages are not awarded as provided for under Pennsylvania law: 12 P. S. §§ 1601-1604; *Spangler v. Helm's N. Y.-Pgh. M. Express*, 396 Pa. 482, 153 A. 2d 490 (1959).

The damages provision in the Massachusetts Death Act is based on concepts of punishment and is penal in nature. This Court so held in *Massachusetts Bonding & Insurance Co. v. United States*, 352 U. S. 128. The Supreme Judicial Court of Massachusetts so held in *Macchiaroli v. Howell*, 294 Mass. 144, 147, 200 N. E. 905 (1936), stating, "The chief characteristic of the statute is penal."

Pennsylvania courts would not enforce the penal limitation of damages contained in the Massachusetts Death Act and, consequently, a federal district court sitting in Pennsylvania would not enforce it, under the doctrine of *Klaxon Co. v. Stentor Electric Mfg. Co.*, 313 U. S. 487 (1941), which holds that a federal court is Constitutionally bound to apply the conflict of laws rule and public policy of the state in which it sits.

The Pennsylvania courts would not enforce the Massachusetts penal limitation because to do so would violate Pennsylvania public policy as expressed in Article III, § 21, of the Pennsylvania Constitution, which provides that the General Assembly may enact workmen's compensation laws "but in no other case shall the General Assembly limit the amount to be recovered for injuries resulting in death . . . ", and also because it has long been the established rule in Pennsylvania that Pennsylvania will not

enforce the penal provisions of a foreign statute, even when they are also remedial in nature: *Nesbitt v. Clark*, 272 Pa. 161, 116 Atl. 404 (1922); *Commercial National Bank v. Kirk*, 222 Pa. 567, 71 Atl. 1085 (1909).

While the Massachusetts statute until now has not been attacked in the Pennsylvania courts on the ground that it contravenes the public policy of Pennsylvania, it was recently considered by the Court of Appeals in the neighboring state of New York. In *Kilberg v. Northeast Air Lines, Inc.*, 9 N. Y. 2d 34, 172 N. E. 2d 526 (1961), plaintiff's decedent was killed in an airplane crash in Massachusetts. Both plaintiff's decedent and the plaintiff were New York domiciliaries. The plaintiff brought suit for wrongful death in the state courts of New York. The New York Court of Appeals, in an opinion by Chief Judge Desmond, declared that New York would refuse to give effect to the Massachusetts penal provision limiting recovery on the ground that that provision contravened the public policy of the state of New York. The Court further held that the plaintiff could recover the compensatory damages which are recoverable under the New York Wrongful Death Act, totally free of the Massachusetts restriction. The Court of Appeals looked to and quoted from Article I, Section 18, of the New York Constitution as an expression of the public policy of that state, providing that "the right of action now existing to recover damages for injuries resulting in death shall never be abrogated, and the amount recoverable shall not be subject to any statutory limitations."

It is clear that the Massachusetts penal provision limiting the recovery of damages in wrongful death actions equally contravenes the public policy of the Commonwealth of Pennsylvania as expressed in Article III, Section 21, of the Pennsylvania Constitution. The Constitution of Pennsylvania, like the Constitution of New York, embodies and expresses the firm public policy of the Commonwealth.

The *Kilberg* ruling, which had been attacked as a violation of the Full Faith and Credit Clause of the United States Constitution, was recently affirmed and applied by the U. S. Court of Appeals for the Second Circuit, sitting en banc, in *Pearson v. Northeast Airlines, Inc.*, 309 F. 2d 553 (1962), *cert. denied*, — U. S. —, 83 S. Ct. 726 (Feb. 18, 1963).

Regardless of the convenience of parties and witnesses, transfer under § 1404(a) may lawfully be ordered only when it would be "in the interest of justice". Justice means fairness. A transfer of death claims which substitutes a harshly restrictive punitive measure of damages for a fully compensatory rule violates all concepts of fairness and, as a matter of law, is not in the interest of justice.

It is submitted that the Court of Appeals would have been bound to vacate the District Court's order of transfer on this ground, even if it had not already determined that the transfer was invalid because Massachusetts is not a district in which the actions "might have been brought".

B. The District Court's Order of Transfer Constituted a Clear Abuse of Discretion.

It is important to note that all of the decedents in these death actions were residents and domiciliaries of the Eastern District of Pennsylvania. All of the plaintiff fiduciaries in these actions are therein domiciled and all were appointed by Pennsylvania courts. All of the survivors entitled to benefit from the wrongful death actions are residents and domiciliaries of the Eastern District of Pennsylvania. At the time of the accident all of the decedents were en route to their Pennsylvania homes on a non-stop flight to Philadelphia. All of the corporate defendants are engaged in business in the Pennsylvania forum. Pennsylvania could hardly have a greater interest in a case or a more significant contact with its parties than in the instant matters. No suggestion has been made that suits by these residents in their home district represent forum shopping or that they

constitute harassment, vexation or oppression as to the defendants in any manner whatsoever.

The weight given by the learned District Judge to such factors as were treated by him as requiring transfer, to the total exclusion of matters of substance invoked by plaintiffs but swept aside to their great detriment, points sharply to the conclusion that the order of transfer constituted a clear abuse of discretion; its grant and the reasons given for its grant skirt dangerously close to the proposition that the supposed convenience of the defendants in and of itself is sufficient to support transfer without genuine regard to the interest of justice and the private interest of the plaintiffs, where both latter factors point overwhelmingly to a contrary result. It is submitted that analysis seriatim of the factors relied on by the District Judge demonstrates clearly that the Court of Appeals was correct in vacating the order involved.

1. *Re Transfer Involving Emasculation of Damages to the Prejudice of the Parties Opposing It.*

Whatever may be said for the weight to be given to "the convenience of parties and witnesses", surely it cannot be said that the words "in the interest of justice" add nothing to the requirements of § 1404(a).[3] Yet here, transfer for supposed "convenience" of the defendants, and of some witnesses, would involve the application in the transferee court of a punitive restriction on the nature and measure of damages of such overwhelming magnitude as to produce nothing less than emasculation of these claims.

We submit that "convenience" cannot here overbalance the enormous potential loss to plaintiffs and their beneficiaries, that the expense to defendants of trial and counsel fees in the Pennsylvania federal court cannot possibly outweigh the detriment to plaintiffs in the radical and sub-

3. See District Court Transcript, Appendix C, *infra*, pp. 6b-8b.

stantial difference in the nature and measure of damages in the two jurisdictions.[4] We further submit that an order placing convenience ahead of the protection of substantive rights and the private interest of the litigant violates rather than furthers the interest of justice.

While it is true that the private interest of the litigants as an important factor to be considered was announced in *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501 (1947), prior to the enactment of § 1404(a), nevertheless, in *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955), this Court held that even though the discretion under § 1404(a) is broader than under the former doctrine of forum non conveniens, the relevant factors to be considered here have not been changed. Even under *Norwood* "the interest of justice" remains the decisive test: *Coffilk v. Atlantic Coast Line R. R. Co.*, 180 F. Supp. 105, 107-8 (E. D. N. Y., 1960).

Pennsylvania has no less an interest in the protection of its domiciliaries than does New York as to its citizens [*Kilberg v. Northeast Airlines, Inc.*, 9 N. Y. 2d 34, 172 N. E. 2d 526; *Pearson v. Northeast Airlines, Inc.*, 309 F. 2d 553; *cert. den.*, — U. S. —, 83 S. Ct. 726; see *Richards v. United States*, 369 U. S. 1 (1962)]. To have so fundamental and deep-reaching an issue determined in the district of their permanent Pennsylvania residence, there favored and supported by local state policy, rather than in a strange and distant forum whose law and policy is in collision with that of their home state, constitutes an overriding consideration which merits the most serious weight and precise attention.

2. *Defendants Wholly Failed to Sustain Their Burden to Show That Transfer Is Justified Under § 1404(a).*

Whatever be the burden upon defendants to support transfer, whether it be to show that the balance is

4. In *Massachusetts Bonding & Insurance Co. v. United States*, 352 U. S. at p. 134, this Court recognized the "substantial differences in recovery" between compensatory damages and the Massachusetts penal limit.

"strongly" in their favor [*Gulf Oil Corp. v. Gilbert*, 330 U. S. 501; *Bush v. United Air Lines, Inc.*, 148 F. Supp. 104, 105 (S. D. N. Y., 1956)], or to show retention to be "oppressive, harassing and vexatious" [*Crawford Transport Co. v. Chrysler Corp.*, 191 F. Supp. 223, 228 (E. D. Ky., 1961)], or to show a "strong balance of inconvenience" [*Calva v. American Air Lines, Inc.*, 177 F. Supp. 238, 239 (D. C. Minn., 1959)], or to show the balance in their favor by "clear and convincing evidence" [*Headrick v. Atchison, Topeka & Sante Fe Ry. Co.*, 182 F. 2d 305 (10 Cir., 1950)], in any event, the interests of justice require that, at the very least, the defendants make some *affirmative* showing in order to overcome the plaintiffs' choice of forum. Where the factors are in doubt or in seeming balance or constitute "a close question" (District Court Opinion, App. in No. 738, p. 2a, in No. 851, p. 21a), then and in such case defendant has failed to sustain its burden and transfer must be denied.

Far from requiring defendants to meet *their* burden to justify transfer, the learned District Judge instead placed upon the plaintiffs the burden of showing why the cases should *not* be transferred and for their alleged failure to sustain *their* burden, set aside their choice of forum. We submit that the grounds advanced by the District Judge in support of transfer and now invoked by defendants demonstrate that the District Court's order was wrong and that the Court of Appeals' action is correct.

a. *Convenience of the Parties.*

The learned District Judge concluded that the first listed factor which "required" transfer was the convenience of the parties (Opinion, App. in No. 738 at p. 3a, in No. 851, at p. 4a). To this entire point, eleven lines of the opinion were devoted. The first three simply state that plaintiffs claim their convenience would be served by a trial in Philadelphia and defendants claim otherwise.

The Court then went on to observe that while the burden on the plaintiffs of bringing their damage testimony in the transferee District had not been overlooked, " . . . this is a burden often falling upon persons, who, having elected to travel away from home, are involved in accidents . . . " (Opinion, App. in No. 738, at p. 4a, in No. 851 at p. 5a).

We submit this to be an extraordinary and novel *ratio decidendi*. It has frequently been held, and with good reason, that defendants engaged in nationwide transportation business are expected to anticipate suits at various points where they operate. See, for example, *Bush v. United Air Lines, Inc.*, 148 F. Supp. 104, 105.

But never before have we heard it suggested, nor have we found any judicial support for the proposition that this burden shall fall not on the corporate defendants who derive their profits from operating in the Eastern District of Pennsylvania as well as elsewhere, but rather upon the individual passengers or their survivors who must, according to the District Court and the defendants, accept the forum fortuitously determined by the locale of impact of the falling aircraft, for no better reason than that they chose to or were required to travel.

The learned Judge then went on to say "none of the affidavits allege that any of the plaintiffs is impecunious nor is their financial condition stated in the records" (Opinion, App. in No. 738, at p. 4a, in No. 851 at p. 5a). We submit that more than anything else, the last quoted sentence demonstrates that the learned District Judge imposed on the plaintiffs the burden to establish hardship or serious inconvenience by retention. We would not think an affidavit would be required to show that travel by the widows (many with young children) from Philadelphia to Boston and their attendance at a protracted trial, would work substantial inconvenience and obvious hardship upon them. We submit that to predicate transfer on the absence of such an affidavit in the instant cases is to indulge in primitive formalism. Clearly the situation here is the

same as that which was so well stated in *Bush v. United Air Lines, Inc.*, in which, in denying the airlines' motion to transfer, the Court stated (148 F. Supp., at p. 105):

> "Here the plaintiff has properly exercised her venue privilege by initiating this action before this court. I have failed to find any substantiation for the defendant's argument that the plaintiff has chosen this forum on the basis of a 'shopping tour.' On the contrary, the plaintiff has all the cogent reasons possessed by a litigant acting with complete forthrightness. This action is a matter of grave concern to her and to her infant children. She has serious burdens of a legal and practical nature to sustain in the ensuing litigation. She can accomplish her task with far greater convenience here, where she is making her home with her children and earning her livelihood, than in Cheyenne, Wyoming, to which she is an utter stranger. This consideration is emphasized by the probable extended length of the trial which can take from two weeks to two months to try. There is not even the suspicion of harassment in her initiation of the suit in this district."

Under this heading of the District Court Opinion, there is absolutely nothing to show in any manner whatsoever how and on what grounds defendants established that the balance of convenience was either "strongly" or otherwise in favor of transfer. The order as to this point is bottomed on nothing more specific than defendants' "claim" of inconvenience and plaintiffs' failure by affidavit or otherwise to show their impecuniosity. Proof that the balance of convenience clearly favored defendants was an essential precondition to the exercise of the Court's discretion in determining where that balance lies. Mere "claim" of inconvenience does not equate with "transfer" under any view of the law. See *United Air Lines, Inc. v. United States*, 192 F. Supp. 796, 798 (D. C. Del., 1961).

We submit that defendants wholly failed to meet their burden.

b. *Convenience of Witnesses.*

Under this heading the District Judge bottomed the transfer order on the ground that a number of listed witnesses reside in the Boston area. However, nowhere does either the District Judge or any defendant point to any substantial inconvenience to these witnesses by the requirement of trial in Philadelphia.

Defendant Eastern Air Lines, Inc., in its affidavit which incorporated the affidavits of General Motors and Lockheed Aircraft Corporation, listed the names of forty-one witnesses, not including the crew and survivors, who are Massachusetts residents. Defendants did not list seven additional witnesses who are listed by the Civil Aeronautics Board as residents from states other than Massachusetts.

But even if these witnesses were not amenable to process for trial in Pennsylvania, analysis with respect to materiality, control and preservation of their testimony shows that it will *not* be lost by refusal to transfer.

Of the 41 witnesses listed by defendant, 16 are employed by the Federal Aviation Administration or the public airlines. Certainly the defendants can control the attendance of their own personnel and there is nothing to indicate that any is unwilling or unable to testify in Pennsylvania. In any event, depositions of the tower personnel or of any other witness may be taken either for discovery or for use at trial, or for both purposes.

Of the remaining 25 witnesses, 6 are children under the age of twelve whose testimony cannot be regarded either as vital or persuasive. The remaining 19 witnesses gave statements and testified at the Civil Aeronautics Board hearing as to the manner of the falling of the aircraft. We doubt that defendants need 19 witnesses to testify that the airplane crashed and how it crashed. Here

again, there is nothing whatever to preclude the taking of their depositions for use at trial.

The key witnesses to this accident are the persons who compose the ten survivors of the crash. Of these, three are from Pennsylvania, two from Georgia, two from Massachusetts, one from South Carolina, and three are in the Armed Services. It is these witnesses whose testimony is most needed at the time of trial, and seven out of ten are not residents of Massachusetts. As stated in *Ultra Sucro Company v. Illinois Water Treatment Company*, 146 F. Supp. 393, 398 (S. D. N. Y., 1956):

> "the judge must endeavor to determine who the key witnesses are rather than merely count up the possible witnesses for each side."

Moreover, any disproportion in numbers of witnesses required by defendant is more than offset by reason of the airline defendant's ability to bring its witnesses on its own planes or those of other carriers, a problem far more easily solved by defendants than by plaintiffs.

The Government adopts (p. 5 in No. 851) the District Judge's holding which brushes aside plaintiffs' genuine burden if forced to produce damage testimony in Boston, by making the sanguine observation that once liability has been determined, few, if any, cases such as these go to trial on damages (p. 8a in No. 851).

This gives scant comfort to the plaintiffs: (1) there is absolutely nothing to indicate that under Massachusetts law liability and damages *can* be severed; the two are inextricably intertwined, i.e., the amount of the damages depends on the degree of culpability; (2) there is no assurance that the Massachusetts court would sever the issues, even if it could do so; (3) it is error to suggest that plaintiffs will not need compensatory damage testimony in Boston unless and until they have overcome the Massachusetts punitive limit. Transfer, if upheld, would include the actions against the United States of America under the

Federal Tort Claims Act; in those actions the Massachusetts penal limit is inapplicable. Thus, even if the penal limit were applied in the corporate suits, plaintiffs would nevertheless be required to prove compensatory damages in Boston rather than in Philadelphia. It flies in the face of all reason and common sense to suggest that this is not harshly burdensome on the plaintiffs to a far greater degree than it could ever inconvenience the defendants; (4) it will be necessary in any event for defendants to produce witnesses in Philadelphia without reference to the transfer of the instant actions; this is so because of the pendency of two suits (arising out of this same crash) against defendant Eastern Air Lines, Inc., in the state courts of Pennsylvania sitting in Philadelphia (*Shakton v. Eastern Air Lines, Inc.*, Court of Common Pleas No. 4, September Term, 1961, No. 237, and Court of Common Pleas No. 6, September Term, 1961, No. 238). Thus, transfer of the instant cases to Boston does not and cannot avoid one or more separate trials in Philadelphia.

c. The Interest of Justice.

The defendant in No. 851 (at p. 5), adequately enumerates the grounds under this heading upon which the District Judge considered transfer to be required. We submit that none of these factors justify transfer, let alone "require" it.

(1) *Transfer From a More Congested Docket and Consolidation With Other Pending Cases.*

If transfer from a more to a less congested docket could fairly be said *ipso facto* to further the interest of justice, the point would merit little discussion. Concededly consolidation with other similar cases pending elsewhere must at first blush appear most attractive to a congested court. But surely the interest of justice is not determined by any array of statistics, either as to the number of cases pending elsewhere or the degree of congestion which obtains, for in that event, transfer would automatically be

made either to the least congested court or to that court having the greatest number of cases arising from the same accident. Such a standard by which to determine where the interest of justice lies is nowhere supported; it is particularly unsupportable here.

We submit that § 1404(a) was never intended as a vehicle to be used by a District Court for the purpose of relieving itself of portions of its own trial list. A transfer on such considerations would be tantamount to a bargain of convenience at the expense of plaintiffs who have done no more than institute suit in their domiciliary forum. [*Bush v. United Air Lines, Inc.*, 148 F. Supp. 104, 105 (S. D. N. Y., 1956); *Keller-Dorian Colorfilm Corp. v. Eastman Kodak Co.*, 88 F. Supp. 863, 866 (S. D. N. Y., 1949)]. Moreover, transfer for such purpose may well create more rather than fewer problems and thus frustrate rather than further the aims of justice. [See *United Air Lines, Inc. v. United States*, 192 F. Supp. 796, 800 (D. C. Del., 1961)]. At least one Court of Appeals has held in a group of airline cases arising from one crash, that the same jury which determines liability must also fix damages [*United Air Lines, Inc. v. Wiener*, 286 F. 2d 302 (9 Cir., 1961)]. Thus, either all cases must be tried before a single jury on both liability and damages, or each must be treated separately.

There is absolutely nothing in the record in the cases at bar to show what benefit, if any, the proposed transfer would accomplish by way of consolidation with other such cases now pending in the Boston Federal Court. Counsels' correspondence on this point with the Clerk of that court showed that these same defendants there made no motions for consolidation, nor have any special procedures been established for trial (App. D, *infra*, pp. 9b-11b).[5] It would thus appear that nothing is to be gained administratively by transfer, which at best would yield "... only insignificant and uncertain benefits ..." *United Air Lines, Inc. v. United States*, 192 F. Supp. at p. 801.

5. Counsel for plaintiffs was informed by the deputy clerk by telephone on March 21, 1963, that this situation has not changed.

(2) *Desirability of Serving All Defendants.*

Further support for transfer is sought in the expression of defendants' "wish" (District Court Opinion, App. in No. 738, p. 2a, in No. 851, at p. 13a) to join as a third-party defendant the Massachusetts Port Authority, suable only in Massachusetts. Without reference to the question whether this vague assertion furnishes a real rather than an illusory reason, we submit that there is absolutely nothing in this record to show that the defendants are in any way unable to maintain their own separate and direct actions against that Authority if they claim it to be responsible, and that without any transfer whatsoever. This was exactly the procedure followed in *United Air Lines v. United States*, reported both in 192 F. Supp. 795 (D. C. Del., 1959) and 192 F. Supp. 796 (D. C. Del., 1961).

(3) *Handling Litigation at Its Origin in a Forum at Home with State Law.*

A further factor claimed by the defendants and adopted by the District Judge as favoring transfer (Opinion, App. in No. 738 at p. 12a, in No. 851 at p. 14a) is the handling of litigation "at its origin" and "in a forum that is at home with state law". We submit that this point is unsubstantial and without merit as a reason for transfer.

Without reference to the fact that the courts of one district must be presumed to be as well qualified to handle litigation as those in another, the District Court in Philadelphia is constantly called upon to determine and apply the laws of other states. Indeed, it may even encounter difficulty in determining the law of the very state in which it sits. The defendants have pointed to no instances where the substantive law of negligence of Massachusetts differs in any particular from the substantive law of negligence of Pennsylvania.

We submit that this contention of the defendants simply unmasks the real purpose of the motions, which is to force

application of the Massachusetts penal restriction to these cases, camouflaged by an illusory appeal to the factors of convenience and justice contemplated by § 1404(a).

The serious inconvenience and genuine hardship to the plaintiffs which would flow from transfer of these cases, together with the emasculation of their damage claims, indicate overwhelmingly that those factors far exceed any genuine inconvenience to defendants by retention of the actions in the domiciliary forum of choice. It is these additional factors which establish that the order of the District Court constituted a clear abuse of discretion. It is these additional reasons which further establish that the Court of Appeals' decision is correct and should not be reviewed.

III. The Opinion of the Court of Appeals Is Consistent with All Other Federal Decisions.

The opinion of the Court of Appeals is in harmony with the only other reported federal case in which transfer of a death action was opposed on the ground that the transferee district was not a district in which the plaintiff had capacity to sue. In *Felchlin v. American Smelting and Refining Company*, 136 F. Supp. 577, suit was filed in a federal court in California by executors who were qualified in California. The defendant moved under § 1404(a) to transfer the case to the Western District of Texas. The Court refused transfer on the ground that the proposed transferee district was not a district in which the action "might have been brought" because the plaintiffs had no capacity to sue in Texas. The *Felchlin* case was examined by the Court of Appeals in the instant cases in the following language (App. in No. 738, p. 27a; App. in No. 851, p. 32a):

> "Respondent and intervenors seek to distinguish Felchlin from the case at bar on the grounds that a suit by a foreign personal representative in Texas is a nullity, whereas in Massachusetts lack of capacity is a mere defense to the action and can be waived. How-

ever, we deem this distinction insubstantial, for whether lack of capacity precludes a prospective plaintiff from filing suit in the first instance, or subjects him to a dismissal at the instance of the defendant, the result is the same. In either case he does not have an unqualified right to sue."

The defendants allege (pp. 12, 15-16 of petition in No. 738; pp. 10-11 of petition in No. 851) that the decision of the Court of Appeals conflicts in principle with this Court's opinion in *Hoffman v. Blaski*, 363 U. S. 335, 344, wherein it is said that it would be grossly discriminatory to permit the defendants to transfer a case to a district to which the plaintiffs could not transfer it without the consent and waiver of the defendants (which is also the situation in the instant case). Defendants complain that plaintiffs may have an unfair choice of forum because they may seek qualification only in the particular state in which they wish to litigate. But that is *not* this case. Here the plaintiffs could and did obtain original appointment as fiduciaries *only* in Pennsylvania, the domicile of each of these decedents, and it is in the domiciliary forum that their actions pend.

Defendants' reasoning is otherwise fallacious. The plaintiff in every case is given a choice of suing the defendant in any district in which the defendant is a resident. In many state courts, including those of Pennsylvania, a defendant may be sued in any county in which he can be served, and there is no provision for transfer. There is nothing unjustly discriminatory, or even unsual, about this.

Moreover, the defendants erroneously assume that the plaintiffs could qualify as personal representatives in Massachusetts merely by applying for ancillary letters there. Such is not the case. The appointment of an ancillary or a special administrator is in the *discretion* of the Massachusetts Probate Court: Mass. General Laws (Ter. Ed.), c. 215, § 3, as amended, 7 Ann. Laws of Mass. 157; Mass. Gen-

eral Laws (Ter. Ed.), c. 193, § 10, as amended, 6 Ann. Laws of Mass. 399 (see App. in No. 738, p. 25a; App. in No. 851, pp. 29a-30a).

The defendants allege (pp. 12-16 of petition in No. 738; pp. 7-11 of petition in No. 851) that the decision of the Court of Appeals conflicts in principle with this Court's opinion in *Continental Grain Company v. The FBL-585*, 364 U. S. 19 (1960). Such allegation is in error.

The *Continental Grain Company* case is completely dissimilar and simply holds that the unique admiralty *in rem* fiction is not relevant to a motion to transfer under § 1404(a). This Court there noted that the *in rem* fiction has for its purpose the allowance of actions against ships "where a person owning the ship could not be reached" (364 U. S. at page 23). It is merely "an alternative way of bringing the owner into court" (364 U. S. at page 26).

The Court of Appeals correctly and succinctly disposed of this argument of the defendants as follows (App. in No. 738, p. 27a; App. in No. 851, p. 32a):

> "The transfer sanctioned in Continental Grain Co. v. Barge FBL-585, 364 U. S. 19, 80 S. Ct. 1470, 4 L. Ed. 2d 1540 (1960), is no help to respondent and intervenors, for that decision is premised on a fiction peculiar to the admiralty law."

It is noteworthy that *Hoffman v. Blaski* (which the Court of Appeals follows), and *Continental Grain Company v. The FBL-585* were argued before this Court on the same day (April 20, 1960), and that the opinions in the two cases were handed down only two weeks apart. It is inconceivable that the principles of law expounded in these two cases could be in conflict.

Goldlawr, Inc. v. Heiman, 369 U. S. 463 (1962), an antitrust case cited by the corporate defendants (page 13 of petition in No. 738) as being in conflict with the opinion of the Court of Appeals, is not in point. It merely held that lack of personal jurisdiction over two corporate de-

fendants by the transferor court did not preclude it from transferring the case pursuant to 28 U. S. C. A. § 1406(a) [a section not even involved in the cases at bar].

In summary, *Felchlin v. American Smelting and Refining Company*, 136 F. Supp. 577, the only other reported decision dealing with the issue involved in the instant case in the more than 14 years in which § 1404(a) has been in effect, is in complete accord therewith. Both that opinion and the instant opinion are in full harmony with *Hoffman v. Blaski*, which holds that a district court has no power to transfer an action under § 1404(a) to any district in which plaintiff did not have an *unqualified* right to bring and maintain the action "independently of the wishes of defendant".

CONCLUSION.

For the foregoing reasons it is respectfully submitted that the petitions for a writ of certiorari should be denied.

Respectfully submitted,

ELWOOD S. LEVY,
DAVID F. BINDER,
Counsel for Respondents (in No. 13,994).

March 27, 1963.

APPENDIX A.

	Civil Action Nos.
Roberta Barrack, Administratrix of the Estate of Jack M. Barrack, Deceased	29,274
Lorraine Browndorf, Administratrix of the Estate of Irving Browndorf, Deceased	29,099
Henry C. Gransden, Administrator of the Estate of Henry V. Gransden, Deceased	28,763
J. Michael King and Berks County Trust Company, Executors u/w of Henry P. King, Deceased	29,615
Barbara B. Meltzer, Administratrix of the Estate of Allan J. Meltzer, Deceased	28,762
Ida G. Schwartz, Executrix u/w of Meyer A. Schwartz, Deceased	29,160
Elizabeth B. Schwartz, Executrix u/w of Theodore William Schwartz, Deceased	29,159
Ruth Staller, Administratrix of the Estate of Phillip Staller, Deceased	30,266
Joyce J. Wright, Administratrix of the Estate of John Allen Wright, Deceased	30,200

v.

EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORP. AND GENERAL MOTORS CORPORATION.

	Civil Action Nos.
Roberta Barrack, Administratrix of the Estate of Jack M. Barrack, Deceased	29,275
Lorraine Browndorf, Administratrix of the Estate of Irving Browndorf, Deceased	29,100
Henry C. Gransden, Administrator of the Estate of Henry V. Gransden, Deceased	28,764
J. Michael King and Berks County Trust Company, Executors u/w of Henry P. King, Deceased	29,616
Barbara B. Meltzer, Administratrix of the Estate of Allan J. Meltzer, Deceased	28,788
Ida G. Schwartz, Executrix u/w of Meyer A. Schwartz, Deceased	29,162
Elizabeth B. Schwartz, Executrix u/w of Theodore William Schwartz, Deceased	29,161
Ruth Staller, Administratrix of the Estate of Phillip Staller, Deceased	30,263
Joyce J. Wright, Administratrix of the Estate of John Allen Wright, Deceased	30,230

v.

THE UNITED STATES OF AMERICA

v.

EASTERN AIR LINES, INC.,
Third Party Defendant.

APPENDIX B.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT.

No. 13,994.

BARRACK, ET AL.,

Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13,997.

POPKIN, ET AL.,

Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.,

No. 14,003.

RAPP, ADMINISTRATOR, ET AL.,

Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.,

Appendix B

No. 14,011.

BIERNBAUM, ET. AL., EXECUTORS, ETC.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL,

No. 14,033.

LAISTER, EXECUTRIX, ETC., ET AL.,
Petitioners,

v.

HONORABLE FRANCIS L. VAN DUSEN, ET AL.,

Present: STALEY and FORMAN, *Circuit Judges*, and LANE, *District Judge*.

It is ORDERED that the last paragraph on page 7 and concluding on page 8 of the opinion of this Court filed November 19, 1962, which reads:

"What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13997 conceded that transfer of the Abate cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Subsequently, counsel informed this court by letter that the Reitz case (Civil Action No. 30303) and the Braff case (Civil Action No. 30304) must even-

tually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. Thus, with respect to these three suits, the district court's order of transfer was proper and will not be set aside."

be and it hereby is amended to read as follows:

What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the Abate cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Thus, with respect to these suits the district court's order of transfer was proper and will not be set aside. Subsequently counsel informed this court by letter that the Reitz case (Civil Action No. 30303) and the Braff case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. With respect to these suits, therefore, we do not pass upon the question whether the district court's order of transfer was proper since it is not contested here.

By THE COURT:

STALEY,
Circuit Judge.

Dated: February 21, 1963

APPENDIX C.

Excerpts From District Court Transcript.

(6) The Court: And, also, I suggest to you in presenting your argument, remember that the Supreme Court and the Appellate Courts have said what justice means in Section 1404(a), and a trial judge is here to carry out the directions of the Appellate Court, not to use his emotional feelings as to what justice may mean in that section. It has been given a definition, and it seems to me that those considerations that have been stated are the considerations which the Court is expected to follow, in the absence of some legislative history or other information showing other considerations.

Similarly, I know of no reason why a court is not expected to recognize that experienced counsel, such as (7) are involved in this case, when they file a suit and they know 1404(a) is in the law, and then to come in here and say, "Oh, isn't it awful," somebody wants to transfer the case. They could have gone into the State Court. There are plenty of other forums that could have been chosen; but when you choose a Federal forum, you accept the law as it is at that time, and 1404(a) was in the Federal law when this case was started, when all these cases were started. And, of course, if the other side sits back and does not make a motion and allows you to go to a lot of expense that is one thing. If there are cases which say that the extent of discovery has been such that the defendant should be estopped, that would be a perfectly proper argument, as I see it, under the cases.

* * *

(10) Mr. Levy: The other observation I would like to make, if the Court please, is that in connection with Your Honor's comments as to 1404(a), I must confess a very uncomfortable feeling of pre-judgment. I hope, of course, that the

feeling is completely misplaced. It may be, and certainly is the law (11) that anyone who institutes suit in the Federal Courts institutes it subject to the laws applicable to the Federal Courts, but it does not follow from the fact that such suit was instituted in the Federal Court that because a motion is made it means "transfer".

The Court: Of course, it does not, but there are a lot of arguments. I am commenting on the briefs. You have got a limited time to argue. I am trying to help you, Mr. Levy. And there are large portions of these briefs which deal with the fact of how terrible it is to even consider the fact of transfer because the plaintiffs' attorneys have done so much work.

Now, I say that the plaintiffs' attorneys in doing work did it having in mind all the federal statutes and federal rules. Now, you can proceed to argue it, but I am just suggesting to you that in using your thirty minutes, each of you, that you have that point in mind, because I think it has been overlooked in many of the briefs.

* * *

Mr. Kreindler: Your Honor, may I ask a question which troubles me a bit and might save some time? The Court indicated that 1404(a) contains its own definition of justice. Now, as I understand 1404(a) it contains three standards, convenience of parties, convenience of witnesses and interest of justice. Is the Court suggesting that interest of justice adds nothing to the other two?

The Court: Oh, no, no.

Mr. Kreindler: I just wanted to——

The Court: No. I just meant that the phrase "interest of justice" as used there had been commented on and defined by the Appellate Courts.

Mr. Kreindler: I see.

The Court: And it was not just a question of a trial judge applying what he thought "justice" meant.

Mr. Kreindler: I misunderstood what Your Honor had said, and I thought you had said that the definition was (13) built into the section itself.

The Court: Oh, no. In so far as I know, there is no definition in the section.

Mr. Kreindler: All right. Thank you.

The Court: But the Appellate Courts have said "these are the considerations——"

Mr. Kreindler: I understand.

The Court: "—which you take into account in determining what the interests of justice are as that phrase is used in that section."

APPENDIX D.

LETTER OF DECEMBER 28, 1961

December 28, 1961

John A. Canavan, Clerk
United States District Court
Federal Building
Boston, Massachusetts

Dear Mr. Canvan:

With reference to the crash of the Eastern Air Lines Electra plane at Logan Airport, Boston, on October 4, 1960, we are advised that approximately seventy-eight law suits arising from this accident are presently pending in the United States District Court for the District of Massachusetts.

Approximately fifty-seven cases arising out of the same accident are also pending in the United States District Court for the Eastern District of Pennsylvania (Philadelphia). In some of these this firm is counsel for the plaintiffs.

Motions to transfer to the Federal Court in Boston are presently pending in the Philadelphia Federal Court. As a matter of interest with respect to the handling of multiple claims arising from a single catastrophe, I would appreciate being advised whether to your knowledge any special procedures have been established in your court with respect to the processing or trial of the cases now pending there. Has any indication been given as to whether each of the cases will be tried separately before separate juries or if there will be consolidation, to what extent? It would also be informative to know whether any motions for consolidation have been filed and if so, whether they have been granted or denied.

I would appreciate any information you could furnish along these lines.

Very truly yours,

ELWOOD S. LEVY

ESL:elp

LETTER OF JANUARY 9, 1962

UNITED STATES DISTRICT COURT
District of Massachusetts
Office of the Clerk
1525 Federal Building
Boston 9

John A. Canavan, Clerk

January 9, 1962

Re: Crash October 4 1960 of Eastern Air Lines Electra plane

Dear Mr. Levy:

This will acknowledge receipt of your letter dated December 28, 1961 upon the subject matter above.

Answering your several questions, please be advised that no special procedures have been established in this District with respect to processing or trial of cases now pending here, nor has any indication been given as to whether the cases will be tried separately or if they will be consolidated for trial. To date, no motion for such consolidation has been filed.

Very truly yours,

JOHN A. CANAVAN
John A. Canavan, Clerk, FRF

Elwood S. Levy, Esquire
Messrs. Richter, Levy, Lord, Toll & Cavanaugh
121 South Broad Street, Philadelphia 7, Pa.

LETTER OF JANUARY 11, 1962

January 11, 1962

Hon. Francis L. Van Dusen
2110 United States Court House
Ninth and Chestnut Streets
Philadelphia 7, Pennsylvania

Re: Eastern Air Lines Electra crash—Boston, October 4, 1960

Dear Judge Van Dusen:

During the preparation of my supplemental brief forwarded on behalf of Barrack et al. December 29 last, it occurred to me that it might be of interest to your Honor to know whether the Massachusetts Federal Court had put into effect any specialized procedures for the processing or expediting of the fifty-seven cases there pending and involving the same crash giving rise to the matters now pending before your Honor. Accordingly, I wrote to the Clerk of the Federal Court at Boston but did not receive a reply until today. I enclose herewith a copy of my letter of December 28 to the Clerk and a copy of his reply dated January 9, 1962.

I think it noteworthy that to date none of the defendants there, which group most certainly includes some or all of the identical defendants here, has filed any motion for consolidation of trials. It would therefore appear that apart from a shorter median interval from the time of suit to the time of trial (which would not be advantageous to plaintiffs) there is nothing to be gained administratively by the transfer of these matters to Boston.

Very truly yours,

ELWOOD S. LEVY

ESL:ch
Enclosures
cc. J. Grant McGabe, III, Esquire
Sidney L. Wickenhaver, Esquire
Owen B. Rhoads, Esquire
Robert E. Jones, Esquire
Max L. Kane, Esquire

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 36

FRANCIS L. VAN DUSEN, United States District Judge, *et al.*,

Petitioners,

v.

ROBERTA BARRACK, Administratrix, etc., *et al.*,

Respondents.

BRIEF OF RESPONDENTS LAISTER, BIRENBAUM, AND SYLVIA BARRACK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

LEE S. KREINDLER,
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

No. 738

FRANCIS L. VAN DUSEN, United States District Judge, et al.,

Petitioners,

v.

ROBERTA BARRACK, Administratrix, etc., *et al.*,

Respondents.

BRIEF OF RESPONDENTS LAISTER, BIRENBAUM, AND SYLVIA BARRACK, IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

Questions Presented

1. Where plaintiffs lacked capacity to sue in Massachusetts, was transfer, under 28 U.S.C. 1404(a), proper?

2. Would transfer from Pennsylvania to Massachusetts be proper where it might deprive Pennsylvania citizens of the benefits of Pennsylvania public policy?

Statement of the Case

1. The Actions Below

The actions below brought in the district of their residence by respondents Doris Laister, Selma Birenbaum, and Sylvia Barrack, against Eastern Airlines only, are for wrongful death of their respective husbands in the Boston crash of October 4, 1960.

Each of the decedents was a citizen and resident of Pennsylvania; the estate of each is being administered in Pennsylvania; and each of the respondents is a citizen of Pennsylvania, except Doris Laister, who was a citizen of Pennsylvania at the time of the accident and at the time the action was started, but who has since moved to Florida. The flight was from Boston to Philadelphia, and the Birenbaum and Barrack tickets had been bought in Pennsylvania.

2. Order of Transfer

Defendant, Eastern Airlines, moved to transfer these actions to Massachusetts. This motion paralleled similar motions in other cases arising out of the accident made by this defendant and other defendants in those actions. Transfer was resisted on the facts, and in addition plaintiffs argued that transfer would deny them the possible application of Pennsylvania public policy. The District Court of Pennsylvania ordered the transfer of these actions and all other actions arising out of the accident.

3. Writ of Mandamus

On plaintiffs' petitions, the Court of Appeals directed the issuance of a writ of mandamus. The court held that since capacity to sue is governed by Massachusetts law under which a foreign administrator lacks capacity, the actions were not ones which "might have been brought" in the District of Massachusetts and, consequently, could not have been transferred there.

REASONS FOR DENYING THE WRIT

1. The Decision Below Has Very Limited Application. Its Alleged Effect Has Been Grossly Exaggerated.

Petitioners maintain that the decision of the Court of Appeals will have a grave and far reaching effect on Section 1404(a); indeed that it will "nullify" it in death actions (Pet. General Motors Corp., Eastern Airlines, Inc. and Lockheed Aircraft Corp., 6-8). They state that the potential transferee District Courts would be limited to seven in number, whereas 44 would be excluded. This claim is grossly exaggerated.

It is to be noted that transfer, under 1404(a), may be ordered only to districts where actions might have been *"brought"*, and not to those where they might have been maintained, or judgments obtained, as stated by petitioners (Pet. 7).

The fact is that, in addition to Massachusetts, only six jurisdictions have held that a foreign administrator lacks the capacity to bring suit for wrongful death.[1]

Of the remaining 44 jurisdictions 30 have held that a foreign administrator may bring a wrongful death action.[2]

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[1] Connecticut: *Noel* v. *St. Johnsbury Trucking Co.*, 157 F. Supp. 432 (DC Conn.); Kentucky: *Louisville and NR Co.* v. *Brantley*, 96 Ky. 297, 28 S. W. 477 (1894); North Carolina: *Hall* v. *So. R. Co.*, 146 N. C. 345, 59 S. E. 879 (1907); South Carolina: *Coburn* v. *Coleman*, 75 F. Supp. 107 (D.C.S.C. 1947); Virginia: *Holt* v. *Middlebrook*, 214 F. 2d 187 (4th Cir. 1954); West Virginia: *Rybolt* v. *Jarett*, 112 F. 2d 642 (4th Cir. 1940).

[2] Seven jurisdictions are conceded (see footnote 2, Pet. 7). As to the remaining jurisdictions see: 52 A.L.R. 2d 1048-1073; 16 Am. Jur., Death § 265, pp. 184-185; Moore's Federal Practice (2d ed.), Vol. 3, ¶ 17.19, p. 1386; 31 Harv. L. Rev. 1167. Alabama: Ala. Code Title 61 § 151, *Campbell* v. *Hughes*, 155 Ala. 591; 47 So. 45; Arkansas: *St. Louis S. K. Co.* v. *Graham*, 83 Ark. 61,

(footnote continued on next page.)

Fourteen states have not decided the question, but reason and text writers favor the overwhelming weight of authority.[3]

In predicting dire consequences to the federal transfer practice, petitioners have apparently failed to distinguish between a foreign administrator suing *as* an administrator, and his suing under a wrongful death statute.

Where a foreign adminstrator is suing as an ordinary personal representative for the use and benefit of the

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(footnote continued from page 3)

102 S. W. 700 (1907); California: *Wallan* v. *Rankin*, 173 F. 2d 488 (9th Cir. 1949); District of Columbia: *Western U. Tel. Co.* v. *Lipscomb*, 22 App. D. C. 104 (1903); Florida: *Florida Cent. and P. R. Co.* v. *Sullivan*, 120 Fed. 799 (5th Cir. 1903); Georgia: Ga. Code §§ 113-2401, 2403, *Taylor* v. *McKee*, 121 Ga. 223, 48 S. E. 943 (1904); Illinois: *Wabash, St. L. and P. R. Co.* v. *Shacklet*, 105 Ill. 364 (1883); Indiana: *Jeffersonville, M. & I. R. Co.* v. *Hendricks*, 41 Ind. 48 (1872), *Memphis and C. Packet Co.* v. *Pikey*, 142 Ind. 304, 40 N. E. 527 (1895), *Bradshaw* v. *Moyers*, 152 F. Supp. 249 (D. C. Ind. 1957); Kansas: *Kent* v. *Kansas Power and Light Co.*, 123 F. Supp. 662 (D. C. Kan. 1954); Maryland: *Smith* v. *Potomac Edison Co.*, 165 F. Supp. 681 (D. C. Md. 1958) (by implication); New Hampshire: *Ghilain* v. *Couture*, 84 N. H. 48, 146 Atl. 395 (1929); New Jersey: *Public Serv. Electric Co.* v. *Post*, 257 Fed. 933 (3rd Cir. 1919), N. J. Rev. Stat. §§ 3A, 12-7; New York: *Provost* v. *Int'l. Giant Safety Coaster Co.*, 152 App. Div. 83, 136 N.Y.S. 654 (1st Dept. 1912), affd. 208 N. Y. 635, 102 N. E. 1112 (1913), N. Y. Decedent's Estates Law § 130; Ohio: *Popp* v. *Cincinnati, H. & D. R. Co.*, 96 Fed. 465 (C. C. Ohio 1899); Pennsylvania: *Greene* v. *Goodyear*, 112 F. Supp. 27 (D. C. Pa. 1953); Rhode Island: R. I. Gen. Laws Ann. § 10-7-2; South Dakota: *Kerr* v. *Basham*, 62 S. D. 301 (1934); Tennessee: *Citizens Fidelity Bank and Trust Co.* v. *Baese*, 136 F. Supp. 683 (D. C. Tenn. 1955); Wyoming: *Ashley* v. *Read Const. Co.*, 195 F. Supp. 727 (D. C. Wyo. 1961). See also: Minnesota: Minn. Stat. § 573.05; Mississippi: Miss. Code Ann. §§ 622, 1453; Nebraska: Neb. Rev. Stat. §§ 30-807, 30-809; Oklahoma: *Kansas Pac. Ry. Co.* v. *Cutter*, 16 Kan. 568 (1876) (interpreting Kansas Statute from which the Oklahoma Statute was derived, and cited in Oklahoma Statutes Annotated).

[3] See: Moore's Federal Practice (2d ed.), Vol. 3, par. 17.19, p. 1386; 21 Harv. L. Rev. 1167. 16 Am. Jur., Death § 265, pp. 184-185.

general estate of his decedent, he lacks authority to sue on the theory that no state can allow property within its jurisdiction to be diverted so as to deprive its own citizens of an opportunity to enforce their claims against it.

"But practically all of the courts which have considered the questions have admitted an exception to the rule where the personal representative is suing, not for the benefit of the general estate, but for the use and benefit of a specified person or classes of person . . ." under a wrongful death statute, *Citizens' Fidelity Bank and Trust Co.* v. *Baese*, 136 F. Supp. 683, 684 (D. C. Tenn. 1955). In the latter case the administrator is suing not in his capacity as such but in the character of a trustee or agent for the benefit of persons entitled to recover. As the recovery belongs to the named beneficiaries, it is not an asset of the estate and the rights of local creditors are not involved.

Massachusetts, if not unique, is in the small minority in holding that a foreign administrator may not sue *under a wrongful death statute* without first obtaining ancillary letters in that state. (*Boutillier* v. *Wesinger*, 322 Mass. 495, 78 N. E. 2d 195 [1948]).

In summation, the number of jurisdictions in which courts have held that a foreign administrator cannot bring an action for the benefit of the decedent's heirs under the forum's wrongful death statute is small (7 including Massachusetts) in comparison to those jurisdictions which permit such an action (at least 30, and probably 44). For this reason, the administration of Section 1404(a), if it is affected at all by the decision below, will be affected only with respect to a handful of states.

2. The Decision Below Is Correct.

Inasmuch as the plaintiffs Laister, Birenbaum, and Sylvia Barrack did not raise the narrow point on which the Court of Appeals based its decision these respondents will

not deal with this issue herein, except to indicate their agreement with the views stated by the Court below.

3. The Decision Below Is Correct on Other Grounds, Also, and Consequently Should Not Be Disturbed.

Massachusetts law limits recovery in a wrongful death action to $20,000.[4] There is no such limitation in Pennsylvania law. Indeed, there is every reason to believe that Pennsylvania public policy would prohibit the invocation of the Massachusetts limitation. Pennsylvania's Constitution (Art. 3, § 21) has a prohibition against wrongful death limitations.

Thus it appears that Pennsylvania would follow the doctrine of *Kilberg* v. *Northeast Airlines*, 9 N. Y. 2d 34, 211 N.Y.S. 2d 133, 172 N. E. 2d 526 (1961), in which the highest court of New York held that the Massachusetts limitation was contrary to New York's public policy, and would not be enforced, although the right of action for wrongful death created by Massachusetts law would be enforced by New York courts.

The constitutionality of the *Kilberg* doctrine has been upheld in *Pearson* v. *Northeast Airlines, Inc.*, 199 F. Supp. 539 (S.D.N.Y. 1961), rev'd 307 F. 2d 131 (2nd Cir. 1962), rev'd *en banc* 309 F. 2d 553 (2nd Cir. 1962), cert. den. —— U. S. —— (Feb. 18, 1963).

Cases raising the *Kilberg* question, i.e., whether Pennsylvania would refuse to enforce another state's limitation of damages for wrongful death, are presently pending before Pennsylvania state courts.[5] While it cannot be stated with certainty that Pennsylvania follows *Kilberg* it appears to respondents to be the overwhelming probability.

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[4] Mass. Gen. Law Ann. Ch. 229, § 2 (Supp. 1961).

[5] *Shackton* v. *Eastern Airlines*, and *Griffith* v. *United Airlines*, pending in Pennsylvania's Court of Common Pleas.

In any event, if the instant cases are transferred, the Massachusetts or transferee court may not have the power to apply Pennsylvania public policy, or even if it does have such power, may not choose to exercise it.

The problem arises out of the basic proposition established by *Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64 (1938), that a federal district court must apply the substantive law of the state in which it sits. This substantive law includes its conflict of laws rules, *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U. S. 487 (1941), and its public policy, *Griffin* v. *McCoach*, 313 U. S. 498 (1941); and *Angel* v. *Bullock*, 330 U. S. 183 (1947). Thus it would seem initially from these important decisions that the transferee court would be obliged to follow the public policy of Massachusetts, rather than Pennsylvania, the transferor state. Several cases support this view: *Reynolds* v. *Baltimore & Ohio Railroad Co.*, 185 F. 2d 27 (7th Cir. 1950), cert. den. 340 U. S. 947 (1951); *Boughton* v. *Shoulders*, 116 F. Supp. 391 (W. D. Ky. 1953); *Viaggio* v. *Field*, 117 F. Supp. 643 (D. C. Md. 1959); *Frachoux* v. *Lykes Brothers S.S. Company*, 117 F. Supp. 234 (S.D.N.Y. 1953); *Crawford* v. *The S.S. Shirley Lykes*, 148 F. Supp. 958 (S.D.N.Y 1957); see Kaufman, *Observations on Transfers under Section 1404(a) of the New Judicial Code*, 10 F.R.D. 395.

The deprivation of plaintiffs' right to the benefits of the public policy of the state of their residence is far more serious than the simple removal of a case from one district to another and is not "in the interest of justice" under Section 1404(a).

Conclusion

These cases should not be reviewed by this Court because the opinion below will not have any appreciable effect upon the administration of Section 1404(a).

Furthermore, the Court of Appeals' decision is correct not only on the ground stated, but for the additional rea-

son, that to allow a transfer from Pennsylvania to Massachusetts might well deprive plaintiffs of the benefits of Pennsylvania public policy relating to recoveries in wrongful death actions.

For the reasons set forth above, the petition for writ of certiorari should be denied.

Respectfully submitted,

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

Nos. ~~750 and [illegible]~~ 56 80

The Hon. Francis L. Van Dusen, etc., et al.,
Petitioners

v.

Roberta Barrack, Administratrix, etc., et al.,
Respondents

BRIEF OF RESPONDENTS HOWARD H. RAPP, ADMINISTRATOR, ET AL., IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1962

NOS. 738 AND 851

The Hon. Francis L. Van Dusen, etc., et al.,
Petitioners

v.

Roberta Barrack, Administratrix, etc., et al.,
Respondents

BRIEF OF RESPONDENTS HOWARD H. RAPP, ADMINISTRATOR, ET AL., IN OPPOSITION TO PETITIONS FOR WRITS OF CERTIORARI

OPINIONS BELOW

1. The opinion of the District Court appears at:
(a) Petition No. 738, App. A. pp. 1a et seq. and
(b) Petition No. 851, App. pp. 2a et seq. and
(c) 204 F. Supp. 426.

2. The unamended opinion of the Court of Appeals appears at:
(a) Petition No. 738, App. B, pp. 26a et seq. and
(b) Petition No. 851, App. pp. 27a et seq. and
(c) 309 F. 2d 953.

3. The order of the Court of Appeals amending said opinion appears in the Appendix to this brief at pp. 1a-3a hereof and is not yet otherwise reported.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254(1).

QUESTION PRESENTED

May a District Court order an action transferred to a district in which plaintiff fiduciary is not qualified to bring it?

Answered in the negative by the Court of Appeals

STATUTE INVOLVED

Section 1404(a) of the Judicial Code, 62 Stat. 937, 28 U.S.C. § 1404(a), provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE

1. The Identity of the Parties.

The Petitioners are:

(a) Various corporations and the United States, all of whom are defendants in certain actions for wrongful death brought by Respondents; and

(b) The learned Judge of the United States District Court for the Eastern District of Pennsylvania who ordered those wrongful death actions transferred

from his Court to the United States District Court for the District of Massachusetts.

The Respondents are:

Various executors or administrators who, on behalf of the estates of their respective decedents, instituted the above-mentioned actions for wrongful death against the corporate and governmental Petitioners.

2. The Decision of the Court of Appeals which Petitioners now ask this Court to Review.

The defendant Petitioners here ask this Court to review that decision of the Court of Appeals for the Third Circuit which held that a writ of mandamus should issue to vacate the District Court's order transferring the subject wrongful death actions to the United States District Court for the District of Massachusetts.

The Court of Appeals so held upon the ground that the subject actions might not have been brought in the District of Massachusetts.

3. The Facts of Record upon which the Court of Appeals so Decided.

Each plaintiff Respondent is a citizen of Pennsylvania and a resident of the Eastern District of said state.

Each of plaintiff Respondents' decedents died in the crash of an airplane in Boston, Massachusetts, on October 4, 1960, for which deaths these actions are brought.

Each of plaintiff Respondents' decedents died a resident of Pennsylvania with all of his assets located in Pennsylvania.

Each plaintiff Respondent is a fiduciary duly appointed by a Register of Wills of Pennsylvania. Two represent intestate estates (Rapp and Frankenfield), and two administer testate estates (Scott and Biernbaum).

No plaintiff Respondent has even been appointed or licensed as such fiduciary by any officer or agency of Massachusetts.

With the exception of actions in the Courts of Common Pleas of Philadelphia, since discontinued without prejudice by agreement, no plaintiff Respondent of this group has brought an action with respect to his decedent in any court other than the United States District Court for the Eastern District of Pennsylvania.

Nevertheless, in the United States District Court for the Eastern District of Pennsylvania, the defendant Petitioners moved to transfer each of said actions to the United States District Court for the District of Massachusetts and, after argument, said motions were granted by the District Court and the order of transfer mentioned above was entered. This is the order which the Court of Appeals vacated.

4. Why These Actions Could Not Have Been Brought in Massachusetts.

(a) The capacity of a representative plaintiff to sue in the United States District Court is to be deter-

mined by the law of the state in which the District Court is held. Fed. R. Civ. P. 17(b).

(b) Under Massachusetts law an action for wrongful death must be brought within one year (Mass. Ann. Laws, ch. 229, § 2) and may be brought only by the decedent's executor or administrator (Mass. Ann. Laws, ch. 229, § 2).

(c) Under Massachusetts law, an administrator appointed in another jurisdiction does not have the right to bring an action under the Massachusetts death statute. *Boutillier* v. *Wesinger,* 322 Mass. 495, 78 N.E. 2d 195 (1948).

(d) In order to have the right to bring an action in Massachusetts, each of these fiduciaries would have had to petition the Probate Court of Massachusetts for a license to do so, making the commissioner of corporations and taxation a party to said petition and giving him 14 days' notice thereof (Mass. Ann. Laws, ch. 204, § 3). The Probate Court might or might not eventually have seen fit to grant said petitions. See *Morgan* v. *Morgan,* 267 Mass. 388, 166 N.E. 747 (1929).

(e) Two of the instant actions, namely, the *Frankenfield* case and the *Scott* case, were commenced in the United States District Court for the Eastern District of Pennsylvania less than 14 days before the expiration of one year from the date of death, and therefore not only was it impossible for these actions to have been brought in Massachusetts

on that date but it was also by then impossible for the plaintiffs to have obtained the necessary license even had they been obliged to try to do so.

5. The Respective Positions of the Parties Before this Honorable Court.

The Petitioners claim that:

The decision of the Court of Appeals vacating the order of transfer was erroneous and certiorari should be granted because that decision is:

(a) contrary to the purpose and spirit of 28 U.S.C. § 1404(a) and in nullification of it in some disaster cases; and

(b) without support in, and indeed contrary to, previously decided cases.

The Respondents claim that:

To the contrary, the decision of the Court of Appeals is correct and is:

(a) required by and in full accord with the letter and intent of 28 U.S.C. § 1404(a) and prior decisions of this and other courts; and

(b) involves no substantial matters of principle or policy.

6. The Nature of this Brief.

This brief is respectfully presented on behalf of plaintiff Respondents Rapp, Biernbaum, Frankenfield and Scott in opposition to the petitions for writs of

certiorari upon the grounds set forth above, i.e., that the decision of the Court of Appeals that these actions might not have been brought in Massachusetts and therefore should not be transferred there was correct and in full accord with the letter and spirit of the statute and prior cases.

To avoid repetition, this brief does not make the arguments made by other plaintiff Respondents which relate to the convenience of the parties and the interests of justice although these Respondents fully join in and approve of those reasons also as establishing the impropriety of a transfer of the subject cases to Massachusetts.

ARGUMENT

1. The Decision of the Court of Appeals Denying Transfer is that Required by the Statute Involved and by Prior Decisions of This and Other Courts.

The subject statute provides as follows:

> "For the convenience of the parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

The Court of Appeals concluded and the defendant Petitioners do not deny that under the law of Massachusetts, summarized above in this brief at pp. 4-5, the instant actions could not have been brought in Massachusetts because the plaintiff Respondents

were not, and in some instances because of the time limitations could not have been, qualified to bring them there.

Defendant Petitioners cannot deny this conclusion but seek instead to avoid it by contending that this Court should hold that the words "where it might have been brought" in Section 1404(a) refer only to the requirements of venue and jurisdiction in personam.

Such a contention is a novel one which has no support in the cases and in support of which defendant Petitioners cite no authority.

This Court, in the recent case of *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), considered two separate appeals which raised the question of whether a Federal District Court might properly transfer actions before it "to a district in which the plaintiff did not have a *right* to bring it". 363 U.S. at 336 (emphasis by the Court). In holding that the District Court had no such power, this Court said:

> "We do not think the § 1404(a) phrase 'where it might have been brought' can be interpreted to mean, as petitioners' theory would require, 'where it may now be rebrought, with defendants' consent.' . . . [T]he power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the action 'might have been brought' by the plaintiff . . . ." 363 U.S. at 342-344.

Here, as defendant Petitioners concede, these actions could not have been brought in Massachusetts by these plaintiff Respondents in the absence of a waiver by defendant Petitioners of certain defenses available to them. This is precisely the situation considered and decided by this Court in *Hoffman* v. *Blaski*.

Commenting on the distinction the Petitioners are asking this Court to make, the Court of Appeals said in its decision in this case:

> "[Petitioners] would limit the holding in *Hoffman* v. *Blaski, supra,* to the requirement that the transferee forum have both venue and jurisdiction of the cause. . . .
>
> "We think that the holding in *Hoffman* v. *Blaski, supra,* compels the conclusion that [the Court below] was without power to transfer these actions. The import of that decision is that unless the plaintiff had an unqualified right to bring suit in the transferee forum at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a). Hence, the fact that at oral argument counsel for intervenors expressed a willingness to waive any objection to petitioners' capacity to sue in Massachusetts is beside the point. Nor can the district court's statement that these actions involve the legal fiction of the appointment of a personal representative be used as a basis for distinguishing them from *Hoffman* v. *Blaski, supra.* Certainly, the requirement of capacity to sue is no more a legal fiction than is the necessity for having proper venue. Obviously, it, like venue, can be waived. Rules

> 9(a) and 12(h), Fed. R. Civ. P. But waiver or the possibility of waiver did not alter the Supreme Court's conclusion in *Hoffman*. In short, we can perceive no basis in either logic or policy for making any distinction between the absence of venue in the transferee forum and a prospective plaintiff's lack of capacity to sue there." 309 F. 2d at 956-957.

Defendant Petitioners further assert that plaintiff Respondents' claim of lack of capacity is a "technicality without real substance" because, say Petitioners, qualification in Massachusetts is a "mere formality". (Government Petition, p. 9).

But as Massachusetts law makes clear, this formality is anything but "mere". Plaintiff Respondents are individuals suing in their representative capacities, and under the law of Massachusetts, if an administrator or executor appointed in another state brings suit and the defendant or defendants to such suit move to dismiss, the motion must be granted. *Boutillier* v. *Wesinger*, 322 Mass. 495, 78 N.E. 2d 195 (1948), citing *Brown* v. *Boston & Maine Railroad*, 283 Mass. 192, 186 N.E. 59 (1933).

Both in the lower Courts and here defendant Petitioners have suggested that plaintiff Respondents could easily have qualified to bring suit and therefore the case ought now to be transferred. For this conclusion defendants rely on *Boudreau* v. *New England Transportation Co.*, 315 Mass. 423, 53 N.E. 2d 92 (1944), wherein a foreign administratrix was per-

mitted to amend her writ to show her subsequent ancillary appointment. But defendant Petitioners fail to point out that the defendant in the cited action did not avail itself of its right to have the action dismissed because of plaintiff's lack of capacity, just as in the *Hoffman* v. *Blaski* situation, had the suit been initiated in the proposed transferee forum where proper venue was absent, the defendant might have waived its objection to venue by failure to raise it.

In order for the administrator of a foreign decedent to obtain an ancillary appointment in Massachusetts, he must institute a separate and distinct action in the Probate Court. Mass. Ann. Laws, ch. 215, § 3.

In the case of an intestate, Section 1 of Chapter 193 of the Annotated Laws of Massachusetts applies and establishes, with respect to the identity of the person appointed, certain priorities which are normally respected, *Newhall Settlement of Estates and Fiduciary Law in Massachusetts,* § 47 (4th ed. 1958), but they are subject to the judgment of the Probate Court as to the suitability of the applicant.*

The requirement that the applicant be adjudged suitable by the Court is clarified by a number of authorities. In *Morgan* v. *Morgan,* 267 Mass. 388, 166 N.E. 747 (1929), the Supreme Judicial Court upheld

* Of the two plaintiff Respondents representing intestate estates now before the Court, Frankenfield, the decedent's widow, is within the priorities set forth in the statute, but Rapp, the administrator of the Zeller estate, is neither the surviving spouse, the next of kin or their guardian, nor a creditor.

the refusal of a Probate Court to appoint an intestate's widow as administratrix. In so doing it said:

> "The apparent purpose of this [statute] was to give the Probate Court a new discretionary power to consider the competency and suitableness of the petitioning party for the discharge of the trust. Upon the record presented to this court the decree dismissing the petition of Mrs. Morgan cannot be said to be wrong as a matter of law." 166 N.E. at 748.

Other cases to the same effect are *Petition of Davis*, 237 Mass. 47, 129 N.E. 366 (1921); *Black* v. *Dobbins*, 325 Mass. 587, 91 N.E. 2d 782 (1950); *Gordon* v. *Shea*, 300 Mass. 95, 14 N.E. 2d 105 (1938); see generally, *Newhall, supra*, § 47 at pages 172-3.

In the event that the non-resident died testate (as is the case of plaintiff Respondent Biernbaum's and Scott's decedents) the procedure for the appointment of an ancillary administrator in Massachusetts is set forth in Sections 9 and 10 of Chapter 192 of the Annotated Laws of Massachusetts. Under those provisions a judicial hearing shall be held after newspaper publication and a finding made by the Court as to the propriety of the proceedings.

Even in the case of an executor named in the will, there is no obligation that the Probate Court appoint him as representative in Massachusetts. There are numerous cases in which the Probate Court has refused to do so. E. g., *Osborne* v. *Craig*, 251 Mass. 169,

146 N.E. 263 (1925); *Martin* v. *Otis*, 233 Mass. 491, 124 N.E. 294 (1919); *Cogswell* v. *Hall*, 183 Mass. 575, 67 N.E. 638 (1903).

Still further, defendant Petitioners have not mentioned another aspect of these cases which bars transfer. Under the wrongful death statute of Massachusetts, which defendant Petitioners contend is the applicable law, the personal representative must bring the action within one year from the date of death;* this requirement is an integral part of the statute creating that right of action and is not a statute of limitations. Mass. Ann. Laws, ch. 229, § 2.

Each of these fiduciaries would have had to petition the Probate Court for a license to commence the actions and, in the case of a testamentary estate (e.g., plaintiff Respondent Scott), publication of such application must be given commencing at least 30 days before the hearing (Mass. Ann. Laws, ch. 192, § 9, 10), and in the case of an intestacy at least 14 days before the hearing (cf. Mass. Ann. Laws, ch. 204, § 3).

But two of the instant actions, *Frankenfield* (an intestacy) and *Scott* (testate estate), were commenced in the lower court less than 14 days before the expiration of one year from the date of death, and therefore it was by then impossible for petitioners to have obtained the necessary license even had they been

* All of plaintiff Respondents' decedents died on the date of the crash, October 4, 1960.

obliged to try to do so.* Nor could defendant Petitioners have waived their "right to raise the defense" for they had no such right—the limitation is of the right as well as of the remedy. *Bickford* v. *Furber*, 271 Mass. 94, 170 N.E. 796 (1930); *Crosby* v. *Boston Elevated Ry. Co.*, 238 Mass. 564, 131 N.E. 206 (1921).

Hence in no sense might these actions have been brought in Massachusetts.

Prior to *Hoffman* v. *Blaski*, only one decision dealt with the exact issue now before the Court, namely *Felchlin v. American Smelting and Refining Co.*, 136 F. Supp. 577 (S. D. Cal. 1955). In that case plaintiffs were executors appointed by the Superior Court of California. Their action was founded on a contract between their testator and defendants, jurisdiction being based on diversity of citizenship. Defendants moved under Section 1404(a) to transfer to Texas, and plaintiffs opposed, arguing that there had been no appointment of a personal representative capable of bringing suit in that state. The Court denied the motion to transfer and held:

> "[I]n all cases in which the doctrine forum non conveniens comes into play, it pre-supposes at least two forums in which the defendant is amenable to process and in which the plaintiff may bring the action."

* Respondent Scott was not appointed in Pennsylvania until October 2, 1961, one day before the expiration of such rights in Massachusetts.

But, said the Court, since plaintiffs did not have a right to bring the action in Texas, therefore, as a matter of law, the Court lacked the power to transfer the action to that District.

Of the *Felchlin* decision, the Court of Appeals in the instant case said:

> "Respondent and intervenors seek to distinguish *Felchlin* from the case at bar on the grounds that a suit by a foreign personal representative in Texas is a nullity, whereas in Massachusetts lack of capacity is a mere defense to the action and can be waived. However, we deem this distinction insubstantial, for whether lack of capacity precludes a prospective plaintiff from filing suit in the first instance, or subjects him to a dismissal at the instance of the defendant, the result is the same. In either case he does not have an unqualified right to sue." 309 F. 2d at 957.

Defendant Petitioners have suggested that plaintiffs Respondents might arrange for the appointment of third persons as ancillary administrators in Massachusetts, but to require that a third person bring a similar but different action in Massachusetts also is in contradiction of Section 1404(a). When Section 1404(a) speaks of "the action" it is not referring merely to a claim which one or more persons might have brought on behalf of interested parties; it is referring to an action in esse with a given plaintiff and a given defendant, as is shown by Rule 3 of the Federal Rules of Civil Procedure which provides in its entirety that:

"A civil action is commenced by filing a complaint with the court." Fed. R. Civ. P. 3.

Thus, by the terms of the Federal Rules themselves there is no action until a complaint is filed, and when it is filed it can only be identified in terms of the parties thereto in conjunction with the claim asserted.

To accept defendant Petitioners' suggestion would be to amend Section 1404(a) to read: ". . . where the claim already asserted by one party might have been asserted either by the same party, if he first obtained permission of the local court, or by an entirely different party. . . ."

This would be contrary to the statute on its face and as interpreted by this Court.

Thus, in considering a motion for transfer, a Court is required to consider the case before it, as it is and not as it might have been. Such a view precludes transfer in the instant cases.

2. No Substantial Matters of Principle or Policy Are Involved.

The Government expresses in its petition (pp. 11-12) the argument that the question of which it seeks review is "important . . . affecting as it does all representative actions". Plaintiff Respondents respectfully submit that the statement is not accurate.

That statement implies that all representative actions are brought in districts from which they should be transferred as a matter of convenience or justice.

This is of course without basis. It also implies that plaintiffs are without priority in their choice of forum. This too has no basis.

Defendant Petitioners argue that the decision below can only result in additional burdens on the Federal Courts. In support of this contention, the Government alleges (at page 11 of its petition in note 8) that as of the end of 1962 there were pending in various federal district courts 420 Federal Tort Claims Act cases arising from airplane accidents.* Aside from the fact that 420 (or 201) is but a very small fraction of pending Federal Tort Claims Act actions and a miniscule portion of the 69,295 civil actions shown in the Appendix (pp. 4a-5a) to be pending in all United States district courts, there is no suggestion that any or all of those actions are subject to motions or orders to transfer. The fact of the matter is that in many instances, as here, there are no compelling reasons for transfer.†

* See pp. 4a-5a of the Appendix hereto, a letter of March 13, 1963, from Administrative Office of the United States Courts, which states that as of December 31, 1962, there were pending in the district courts a total of 201 airplane tort actions against the Government.

† Aside from neglecting plaintiffs' rights as to choice of forum, from an over-all standpoint of administration of justice in the United States this argument of defendant Petitioners totally overlooks the fact that in the instant situation, as in others, there are pending suits in courts of states other than Massachusetts which cannot be removed to the Federal Courts, much less transferred by them, e.g., *Shackton* v. *Eastern Air Lines, Inc.*, (2 cases), C. P. No. 4, Sept. Term, 1961, No. 238 and C. P. No. 6, Sept. Term, 1961, No. 237 (Phila. Co.). Thus the issue of liability for this air crash will have to be litigated in Philadelphia and, perhaps, in other state courts.

Defendant Petitioners argue also that the decision below is in contradiction of the policies of this Court and Congress, but certainly it is not in conflict with the transfer statute, as considered above. Defendants' argument also ignores the policy of a majority of the states and *this Court* as articulated in the Federal Rules of Civil Procedure.

As set forth at considerable length in the petition in No. 738 (pp. 6 to 9 and notes 2 to 8) only seven states "permit a foreign fiduciary to obtain judgment in wrongful death actions by virtue of his foreign appointment" and only one permits such procedure in the case of other actions. Defendant Petitioners thus emphasize the fact that in this country there is an almost universal policy against suits by non-qualified foreign fiduciaries. Yet in the same document they argue that this Court should overturn a decision which respects this policy and should allow the transfer of actions into states where those actions could not have been initiated! To transfer these cases, brought by Pennsylvania administrators, to Massachusetts, a jurisdiction whose public policy is against litigation by non-qualified representatives, would be contrary to that policy and also to the doctrine of *Erie Railroad Co.* v. *Tompkins,* 304 U.S. 64 (1938).

However, it is not necessary to rely on the obvious truth that the policy of the states merits respect. There is, for the purpose of considering petitions for writs of certiorari, an even more convincing argument—that

the decision below is consistent with the over-all policy of the Federal system.

This Court in 1938 promulgated the Federal Rules of Civil Procedure of which Rule 17(b), materially unchanged since then, provides expressly that the capacity of an individual acting in a representative capacity to sue shall be determined by the law of the state in which the district court is held.* The District Court in Massachusetts must look to the law of Massachusetts to determine the capacity of these plaintiffs to sue and the law of Massachusetts is (as defendant Petitioners concede) that a motion to dismiss an action brought by an out-of-state fiduciary shall be granted. Thus plaintiff Respondents are not qualified in that state and therefore these are not actions which "might have been brought" in the District of Massachusetts.

* "CAPACITY TO SUE OR BE SUED. . . . In all other cases, capacity to sue or be sued shall be determined by the law of the state in which the district court is held. . . ." Fed. R. Civ. P. 17(b).

CONCLUSION

For the foregoing reasons the Petitions for Writs of Certiorari should be denied.

Respectfully submitted,

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APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 13,994

BARRACK, ET AL.,
petitioners
v.
HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 13,997

POPKIN, ET AL.,
petitioners
v.
HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,003

RAPP, ADMINISTRATOR, ET AL.,
petitioners
v.
HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,011

BIERNBAUM, ET AL., EXECUTORS, ETC.,
petitioners
v.
HONORABLE FRANCIS L. VAN DUSEN, ET AL.

No. 14,033

LAISTER, EXECUTRIX, ETC., ET AL.,
petitioners
v.
HONORABLE FRANCIS L. VAN DUSEN, ET AL.

Present: STALEY and FORMAN, *Circuit Judges*, and LANE, *District Judge*.

It is ORDERED that the last paragraph on page 7 and concluding on page 8 of the opinion of this Court filed November 19, 1962, which reads:

> "What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Subsequently, counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. Thus, with respect to these three suits, the district court's order of transfer was proper and will not be set aside."

be and it hereby is amended to read as follows:

> What we have stated thus far must be qualified to the following extent. At oral argument counsel for petitioners in No. 13,997 conceded that transfer of the *Abate* cases (Civil Action Nos. 30300 and 30307) was proper inasmuch as that petitioner is a resident of Massachusetts duly qualified in that state as an administrator. Thus, with respect to these suits the district court's order of transfer was proper and will not be set

aside. Subsequently counsel informed this court by letter that the *Reitz* case (Civil Action No. 30303) and the *Braff* case (Civil Action No. 30304) must eventually be transferred to the district court in Massachusetts since venue in the Eastern District of Pennsylvania is improper. With respect to these suits, therefore, we do not pass upon the question whether the district court's order of transfer was proper since it is not contested here.

By THE COURT

STALEY

Circuit Judge

Dated: February 21, 1963

ADMINISTRATIVE OFFICE OF THE
UNITED STATES COURTS
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Washington 25, D. C.

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Director

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Deputy Director

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Procedural Studies and Statistics

March 13, 1963

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Philadelphia 9, Pennsylvania

Attention: Margaret E. Allen
Law Librarian

Gentlemen:

The number of civil cases pending in all United States district courts on December 31, 1962 was 69,295.

On the same date the following tort actions were pending against the Federal government:

	Number of Cases
Personal injury or death—airplane	201
Personal injury or death—motor vehicle	1,023
Personal injury or death—marine	185
Personal injury or death—other	620
Damage to personal property	210
Damage to real property	113

Whether or not the Federal Tort Claims Act was mentioned in the complaint is not always reported to us. Therefore we can give you only the above figures by nature of suit.

Sincerely yours,

/s/ ORIN S. THIEL
Orin S. Thiel
Assistant Chief

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IN THE

Supreme Court of the United States

October Term, 1962

No. [redacted]. 56

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION and GENERAL MOTORS CORPORATION, *Petitioners,*

and

THE UNITED STATES OF AMERICA

v.

ROBERTA BARRACK, Admx., etc., et al.,
SIDNEY W. POPKIN, et al.,
HOWARD H. RAPP, Admr., etc., et al.,
LEAH BIERNBAUM, Extrx., etc., et al.,
DORIS A. LAISTER, Extrx., etc., et al.,
Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1962.

No. 738.

THE HONORABLE FRANCIS L. VAN DUSEN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION AND GENERAL MOTORS CORPORATION,

Petitioners,

and

THE UNITED STATES OF AMERICA,

v.

ROBERTA BARRACK, ADMX., ETC., ET AL.,
SIDNEY W. POPKIN, ET AL.,
HOWARD H. RAPP, ADMR., ETC., ET AL.,
LEAH BIERNBAUM, EXTRS., ETC., ET AL.,
DORIS A. LAISTER, EXTRX., ETC., ET AL.,

Respondents.

REPLY BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

This reply brief is made necessary by the withdrawal by the Court of Appeals of an express holding as to two of

these cases after the Petitions for Certiorari[1] were filed with this Court and by respondents' reliance on grounds for affirmance which were not ruled on by the Court of Appeals.

The change in the opinion below emphasizes the importance of the question involved by clearly demonstrating that the court's ruling applies to Section 1406(a) of the Judicial Code as well as to Section 1404(a). The Court of Appeals had previously ruled that two of these cases must be transferred to Massachusetts under 1406(a), since venue was improper in Pennsylvania (Petition, Appendix B, p. 29a), although it held that transfer could not have been made under 1404(a). After petitioners suggested that the Court's ruling was equally restrictive of 1406(a) (Petition No. 738, p. 11; Petition No. 851, p. 13), the Court of Appeals, at respondents' request, removed this inconsistency by withdrawing the court's holding directing transfer of these two cases.[2] It is now therefore indisputable that the court's restrictive interpretation of the "might have been brought" requirement of 1404(a) equally limits transfer under 1406(a).

Some of the respondents contend that certiorari should be denied because the resolution of issues not reached by the Court of Appeals requires affirmance. They claim that if the cases are tried in Pennsylvania plaintiffs might be able to recover full compensatory damages against the corporate defendants, but will be able to recover only a maximum of $20,000 against them if the cases are tried in Massachusetts.

This contention is baseless. Two established principles of law each insure that the measure of damages will be the same irrespective of whether the cases are tried in Pennsylvania or Massachusetts.

---

1. A Petition for Certiorari has also been filed on behalf of the United States, No. 851, October Term, 1962.

2. The order, dated February 21, 1963, is printed in Appendices to Respondents' Briefs.

First, the transferee district is required to apply the law of the transferor district, including its choice-of-law rules, in the trial of a case transferred under 1404(a). *H. L. Green Co., Inc. v. McMahon*; 312 F. 2d 650 (2d Cir. 1962); *Headrick v. Atchison, T. & S. F. Ry.*, 182 F. 2d 305 (10th Cir. 1950); *Gomez v. The S. S. Dorothy*, 183 F. Supp. 499 (D. Puerto Rico 1959); *Hargrove v. Louisville & N. R. R.*, 153 F. Supp. 681, 684 (W. D. Ky. 1957); *Greve v. Gibraltar Enterprises*, 85 F. Supp. 410, 414 (D. N. M. 1949).

The second is the rule of Pennsylvania law that the statutory law of the place of the injury determines whether a cause of action for wrongful death arises [3] and that the measure of the damages is a substantive matter governed by the wrongful death statute of the place of injury.[4] This rule is in accord with the Restatement, Conflict of Laws, §§ 384, 412, 417, 391 Comment (d). The Court of Appeals for the Third Circuit has applied this rule,[5] and has held specifically that a limitation on recovery to a maximum sum of $15,000 under the statute of the place of the injury was correctly applied by the District Court for the Eastern District of Pennsylvania.[6] Further, the Supreme Court of Pennsylvania has held that the Constitution and public policy of Pennsylvania have no extra-territorial force to create a cause of action even in favor of a Pennsylvania resident against another Pennsylvania resident, and that plaintiffs have no cause of action where none exists under the *lex loci delicti*.[7] Thus regardless of whether the cases

3. *Marson v. McElhinney*, 370 Pa. 622 (1952); *Foley v. The Pittsburgh-DesMoines Co.*, 363 Pa. 1, 9 (1949); *Smith v. Pennsylvania R. R.*, 304 Pa. 294 (1931); *Hoodmachar v. Lehigh Valley R. R.*, 218 Pa. 21 (1907); *Usher v. West Jersey R. R.*, 126 Pa. 206 (1889).

4. *Rodney v. Staman*, 371 Pa. 1 (1952); *Rennekamp v. Blair*, 375 Pa. 620, 621, 622 (1954).

5. *Knecht v. United States*, 242 F. 2d 929 (3d Cir. 1957); *Curtis v. Campbell*, 76 F. 2d 84 (3d Cir. 1935), cert. denied, 295 U. S. 737 (1935).

6. *Knecht v. United States*, 242 F. 2d 929 (3d Cir. 1957).

7. *Benarowicz v. Vetrone*, 400 Pa. 385 (1960).

are tried in Pennsylvania or Massachusetts, plaintiffs may recover only such damages as Massachusetts law allows.

Finally, respondents' suggestion that transfer is improper because of some possibility that there might be a difference in recoverable damages squarely conflicts with the decision of the Sixth Circuit in *Goranson v. Kloeb*, 308 F. 2d 655 (6th Cir. 1962). In that case the court approved an order transferring an action for the death of an Ohio resident from Ohio to the Eastern District of Virginia where the aircraft crashed, even though Virginia law limits recovery to $30,000 and the Ohio constitution expressly provides that there should be no limitation in the amount of recovery for wrongful death.

Respectfully submitted,

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IN THE

Supreme Court of the United States

October Term, 1963.

No. 56.

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION, GENERAL MOTORS CORPORATION and THE UNITED STATES OF AMERICA,

Petitioners,

v.

ROBERTA BARRACK, Admx., etc., et al.,
SIDNEY W. POPKIN, et al.,
HOWARD H. RAPP, Admr., etc., et al.,
LEAH BIERNBAUM, Extrx., etc., et al.,
DORIS A. LAISTER, Extrx., etc., et al.,

Respondents.

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1963.

No. 56.

THE HONORABLE FRANCIS L. VAN DUSEN, JUDGE OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA, EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION, GENERAL MOTORS CORPORATION, AND THE UNITED STATES OF AMERICA,

Petitioners,

v.

ROBERTA BARRACK, ADMX., ETC., ET AL.,

SIDNEY W. POPKIN, ET AL.,

HOWARD H. RAPP, ADMR., ETC., ET AL.,

LEAH BIERNBAUM, EXTRS., ETC., ET AL.,

DORIS A. LAISTER, EXTRX., ETC., ET AL.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PETITIONERS.

OPINIONS BELOW.

The opinion of District Judge Van Dusen directing transfer of 45 civil actions from the Eastern District of Pennsylvania to the District of Massachusetts pursuant to Section 1404(a) of the Judicial Code (R. 1-20) is reported

sub nom. Popkin, et al. v. Eastern Air Lines, et al., 204 F. Supp. 426 (E. D. Pa. 1962). The opinion of Circuit Judges Staley and Forman and District Judge Lane of the United States Court of Appeals for the Third Circuit directing that the order be vacated (R. 71-77) is reported *sub nom. Barrack v. Van Dusen*, 309 F. 2d 953 (3d Cir. 1962). An order amending a portion of this opinion dated February 21, 1963, is not yet reported but is printed in the Record at pages 95-96.

JURISDICTION.

The writ of mandamus directing Judge Van Dusen to vacate and set aside the order of transfer was issued on December 14, 1962 (R. 79-81), in accordance with the Court's order entered December 7, 1962 (R. 78-79). The Petition for Writ of Certiorari (No. 56) was filed with this Court on January 11, 1963 and was granted on April 15, 1963 (R. 97). The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254(1).

QUESTION PRESENTED.

Where 114 actions arising out of the accident here involved have been instituted in the District of Massachusetts, the accident having occurred there, that being the only district in which all requirements of venue and jurisdiction might have been met as to all defendants, and the District Court having determined that 45 wrongful death and personal injury actions instituted against four of the same defendants in Pennsylvania should be transferred to Massachusetts for the convenience of witnesses and in the interest of justice, does plaintiffs' failure, in some of these wrongful death actions, to apply for ancillary appointments as personal representatives in Massachusetts foreclose that district from being a district where these wrongful death actions "might have been brought" within the meaning of Section 1404(a) of the Judicial Code?

STATUTE INVOLVED.

Section 1404(a) of the Judicial Code, 28 U. S. C., § 1404(a), provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

STATEMENT OF THE CASE.

One hundred and sixty-six actions for wrongful death or personal injuries presently are pending in United States District Courts arising from the crash of a commercial aircraft shortly after take-off from International Airport in Boston on October 4, 1960. One hundred and fourteen of these suits were brought in the District of Massachusetts. Fifty-two of them were instituted in the Eastern District of Pennsylvania.[1]

This Petition involves 40 of the wrongful death and 5 of the personal injury actions which were brought by respondents in the Eastern District of Pennsylvania against Eastern Air Lines, Inc., Lockheed Aircraft Corporation, General Motors Corporation and the United States of America.[2] Jurisdiction is based on diversity of citizenship

1. A number of plaintiffs in both courts instituted separate suits against one or more of the defendants.

2. Seven of the present respondents also brought actions in the Eastern District of Pennsylvania in admiralty. Prior to the entry of the Order directing transfer of the present cases to Massachusetts, Judge Van Dusen directed dismissal of the admiralty actions on the ground that admiralty did not have jurisdiction over the claims arising out of the accident. *Weinstein v. Eastern Air Lines, Inc., et al.*, 203 F. Supp. 430 (E. D. Pa. 1962). On April 26, 1963, the Court of Appeals reversed. 316 F. 2d 758 (3d Cir. 1963). On July 16, 1963, a Petition for a Writ of Certiorari was filed seeking review by this Court of the reversal of Judge Van Dusen's dismissal of the admiralty actions. *Eastern Air Lines, Inc., et al. v. Weinstein, et al.*, October Term, 1963, No. 276.

and, as to the United States, on the Federal Tort Claims Act. The same parties are defendants in the actions pending in Massachusetts. In some of the Massachusetts suits, the Massachusetts Port Authority is also a defendant. Eastern, Lockheed and General Motors are subject to suit in both districts. Due to the venue provisions of the Federal Tort Claims Act and the location of the Massachusetts Port Authority, Massachusetts is the only district in which all of the actions arising from this crash may be maintained against all defendants (R. 11).

Under these circumstances, defendants filed motions to transfer these 45 actions to Massachusetts [3] in accordance with Section 1404(a) of the Judicial Code. Following extensive oral argument and careful consideration of the briefs, affidavits, and other matters submitted by the parties, Judge Van Dusen granted the motions. He found that these actions "might have been brought" in Massachusetts and concluded that transfer would be for the convenience of witnesses and in the interest of justice. Among other things, he found that the District of Massachusetts will be more convenient for the presently known witnesses on the issues of liability; that consolidation of the actions pending in Pennsylvania with those in Massachusetts for purposes of proceedings before trial is likely to produce more fair and orderly trials for all litigants and to save needless time and expense to the public, including jurors, and other litigants whose cases are awaiting trial; and that consolidation of all these cases will result in the conduct of fewer trials on the issues of liability, thereby avoiding the economic waste involved in duplicating litigation and the risk of inconsistent results as to liability.

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3. The motions also sought transfer of the seven admiralty actions. Judge Van Dusen found it unnecessary to consider the motions in so far as they sought transfer of the admiralty actions, however, since he previously had held that jurisdiction did not lie in admiralty. See footnote 2, *supra*.

The plaintiffs below, the present respondents, petitioned the Court of Appeals for the Third Circuit for writs of mandamus or prohibition (R. 22-48; 51-60). The defendants, petitioners here, were permitted to intervene in the Court of Appeals in opposition (R. 65). The Court of Appeals held that Judge Van Dusen was without jurisdiction to transfer the wrongful death actions (R. 71-77) and directed him to reconsider transfer of the personal injury cases in light of this ruling (R. 77). The sole basis for this opinion was that because some of the personal representatives had not applied for ancillary letters of administration in Massachusetts, the actions might not have been brought there. The court conceded that it was "quite likely" that ancillary letters would have been granted if application had been made and recognized that all defendants were subject to suit in Massachusetts (R. 76). It held, however, that Section 1404(a) did not authorize transfer to a district where the named plaintiffs did not have an absolute right to sue under the law of the state in which the court was located without having first applied for ancillary letters of appointment (R. 74-77).[4]

In resolving this issue against transfer, the Court of Appeals relied on this Court's opinion in *Hoffman v. Blaski*, 363 U. S. 335 (1960) (R. 74-76). The District Court had resolved the issue in favor of transfer relying on this Court's later decision in *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19 (1960) (R. 19-20).

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4. The transfer order was not set aside as to three wrongful death actions in which venue in the Eastern District of Pennsylvania was improper as to the United States. The Court of Appeals originally held that all three were properly transferred to Massachusetts, presumably under the provisions of Section 1406(a) of the Judicial Code (R. 77). Since this provision authorizes transfer only to a district in which the action "could have been brought" and plaintiffs in two of these cases have not applied for ancillary letters of administration in Massachusetts, the Court of Appeals withdrew its holding as to these cases after the petitions for certiorari were filed (R. 95-96).

SUMMARY OF THE ARGUMENT.

The intent of Congress in enacting Section 1404(a) was that any civil action might be transferred to districts such as Massachusetts where the requirements of venue and jurisdiction can be met. Section 1404(a) was drafted in accordance with the common law doctrine of *forum non conveniens*. That doctrine presupposed only an alternative forum in which the defendant was amenable to suit; the existence of other defenses in the alternative forum did not bar dismissal. Accordingly, in enacting Section 1404(a), Congress authorized transfer to any district in which the action "might have been brought." By the venue provisions of the Judicial Code it designated Massachusetts as a district in which these actions "may be brought" or "may be prosecuted." It follows that Congress intended that these actions "might have been brought" in that district where defendants are amenable to suit and that they may be transferred there now. In fact, numerous actions for wrongful death arising from this crash have been brought against these same defendants in Massachusetts. The use of the language "could have been brought" in Section 1406(a) of the Judicial Code and the meaning of the term "action" as applied to representative parties in the Federal Rules of Civil Procedure also support the conclusion that the capacity of the representative plaintiff is not relevant to determining whether an action may be transferred under Section 1404(a).

The decisions of this Court and of others demonstrate that Section 1404(a) has been and should be interpreted in this fashion. The construction adopted by the Court of Appeals would discriminate against defendants by giving plaintiffs an absolute right to "forum shop," contrary to this Court's opinion in *Hoffman v. Blaski*, 363 U. S. 335 (1960). It would make the method of bringing the action decisive of transfer, contrary to this Court's opinion in *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19 (1960).

Nearly all courts which have interpreted Section 1404(a) have concluded that defenses in the transferee district other than those of venue and jurisdiction do not preclude transfer under Section 1404(a).

Efficient administration of the federal courts requires that ambiguity, if any, in the "might have been brought" phraseology be resolved in favor of transfer. Otherwise, district court judges will be unable to relieve the federal courts of duplicating litigation in multiple districts in cases where the availability of Section 1404(a) is most important. This interpretation need not result in prejudice to any party by reason of potential defenses in the transferee district. Numerous techniques and principles are available and have been used by district courts to insure that transfer will not become a method of defeating a party's claim.

Finally, under Massachusetts law these actions might have been brought in Massachusetts regardless of defendants' consent. Plaintiffs might have obtained ancillary appointments in Massachusetts as a matter of routine formality. In fact, plaintiffs in three of these actions did so and brought actions in both Massachusetts and Pennsylvania.

ARGUMENT.

I. The "Might Have Been Brought" Requirement Is Limited to Venue and Jurisdiction.

The reasons expressed by the district court for the transfer of these cases serves the design of Congress in enacting Section 1404(a). Its purpose was to reduce "wastefulness of time, energy and money," and to "protect litigants, witnesses and the public against unnecessary inconvenience and expense" arising from duplicating litigation in multiple districts. *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19, 27 (1960). Despite this, the Court of Appeals held that the transfer order was invalid. It reasoned that because the plaintiffs in the wrongful death actions had not applied for ancillary letters of administration in Massachusetts, the actions might not have been brought there.

Common sense would dictate that these actions "might have been brought" in Massachusetts because numerous other actions for wrongful death arising from this accident have been brought against these same defendants in Massachusetts (R. 2, 8-12), three of them by plaintiffs[5] who are plaintiffs in three of these wrongful death actions.[6] More

5. *Doris A. Laister, as Executrix and as Special Administratrix of the Estate of Chester H. Laister, deceased v. Lockheed Aircraft Corporation, General Motors Corporation, Massachusetts Port Authority and United States of America*, No. 61-766-J; *Selma Birenbaum, Abe Birenbaum and Abram P. Piwosky, as Executors and Special Administrator of the Estate of Martin Birenbaum, deceased v. Lockheed Aircraft Corporation, General Motors Corporation, Massachusetts Port Authority, and United States of America*, No. 61-764-J; *Sylvia Barrack, as Special Administratrix and Administratrix with the Will Annexed of the Estate of Morris Barrack, deceased v. Lockheed Aircraft Corporation, General Motors Corporation, Massachusetts Port Authority and United States of America*, No. 61-763-J.

6. *Doris A. Laister, as Executrix of the Estate of Chester H. Laister, Deceased v. Eastern Air Lines, Inc.*, Civil Action No. 29724; *Selma Birenbaum, Abe Birenbaum and Abram P. Piwosky, as Ex-*

importantly, the manifest intent of Congress in enacting Section 1404(a) and the decisions of this Court and of others demonstrate that the "might have been brought" requirement is limited to requirements of venue and jurisdiction. Since these requirements could have been met in Massachusetts, that district is a district in which these actions "might have been brought" within the meaning of Section 1404(a).

A. The Acts of Congress.

The historical background of Section 1404(a) demonstrates that the phrase "might have been brought" requires only that the transferee district be one in which the defendants are amenable to suit. The Reviser's Notes and the decisions of this Court[7] state that 1404(a) was drafted in accordance with the common law doctrine of *forum non conveniens*. Under this doctrine a dismissal could be entered only if there was a second forum in which the defendants were amenable to suit. *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 506-507 (1947). The availability of defenses in the alternate forum other than that defendants were not subject to suit there did not inhibit the discretionary power of dismissal under the doctrine. Dismissals were upheld notwithstanding the fact that the statute of limitations might have run in the alternate forum,[8] or that under the applicable law of the alternate forum the damages recoverable might have been less than those recoverable in the forum in which suit was instituted.[9] It follows that the

ecutors of the Estate of Martin Birenbaum, Deceased v. Eastern Air Lines, Inc., Civil Action No. 30288; *Sylvia Barrack, as the widow of Morris Barrack, Deceased, and the First Pennsylvania Banking & Trust Company, as Executor of the Estate of Morris Barrack, Deceased v. Eastern Air Lines, Inc.*, Civil Action No. 30289.

7. *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955); *Ex parte Collett*, 337 U. S. 55 (1949).

8. *Gulf Oil Corp. v. Gilbert*, 330 U. S. 501, 516 (1947).

9. *Canada Malting Co. v. Paterson Co.*, 285 U. S. 413 (1932); *The Paula*, 91 F. 2d 1001 (2d Cir. 1937).

"might have been brought" requirement of 1404(a) should not be construed to prohibit transfer so long as the transferee district is one in which the defendant is amenable to suit.

Other provisions of the Judicial Code, enacted with Section 1404(a) as a revision of the entire Code, also indicate that Congress intended the "might have been brought" requirement to be limited to districts in which proper venue and jurisdiction existed. Section 1404(a) is contained in Part IV of Title 28, United States Code, Chapter 87, which are respectively entitled "Jurisdiction and Venue," "District Courts; Venue." And most of the sections governing venue of civil actions contained in Part IV, Chapter 87, use the phrase "may be brought" or "may be prosecuted" in defining the districts in which venue is proper.[10] As applied to these actions against the corporate defendants, Section 1391(a) designates the District of Massachusetts as a district in which these actions "may be brought" and, as to the United States, Section 1402(b) designates it as a district in which the actions "may be prosecuted." Since these actions "may be brought" or "may be prosecuted" in the District of Massachusetts, the use of similar language by Congress in Section 1404(a) compels the conclusion that it intended that these actions might be transferred there because they "might have been brought" in that district.

10. See, e.g., 28 U. S. C., § 1391(a) (diversity jurisdiction); 28 U. S. C., § 1391(b) (federal question jurisdiction); 28 U. S. C., § 1392 (defendants or property in different districts of same state); 28 U. S. C., § 1393(b) (defendants in different divisions); 28 U. S. C., § 1394 (actions against Comptroller of Currency); 28 U. S. C., § 1395 (actions for recovery of fines, penalties or forfeitures); 28 U. S. C., § 1396 (actions for recovery of internal revenue taxes); 28 U. S. C., § 1397 (interpleader); 28 U. S. C., § 1399 (partition actions); 28 U. S. C., § 1400(b) (actions for patent infringement); 28 U. S. C., § 1401 (stockholders' derivative actions); 28 U. S. C., § 1402 (United States as defendant). Other venue provisions use the language "shall be brought" or "may be instituted." 28 U. S. C., § 1398 (Interstate Commerce Commission orders); 28 U. S. C., § 1400(a) (copyright actions); 28 U. S. C., § 1403 (eminent domain).

As pointed out by the dissenting opinion of Judge Hastie in *Paramount Pictures v. Rodney*, 186 F. 2d 111, 116 (3d Cir. 1950):[11]

> "This background suggests that proper venue in more than one forum is the limiting context of the Code revision and that within this context Section 1404(a) substitutes a broad power of transfer for a more restricted pre-existing power of dismissal. Plaintiffs are prevented from abusing their normal privilege of choice among districts of proper venue. At the same time, courts are directed to respect the legislative enumeration of places which Congress has deemed appropriate for the trial of various types of litigation." (186 F. 2d 115, 118).

Section 1406(a) of the Judicial Code also supports this conclusion. That section authorizes transfer of cases from a district in which venue is improper "to any district or division in which it *could have been brought*" (emphasis supplied). But unless this requirement is limited to venue and jurisdiction, personal representatives who institute suit in a district in which they mistakenly believe venue to be proper will have the suit dismissed rather than transferred to a proper district if they have failed to qualify in that district.[12] Such a dismissal, rather than transfer, would be directly contrary to the result which Congress intended in enacting Section 1406(a). See *Goldlawr, Inc. v. Heiman*, 369 U. S. 463, 466-467 (1962). Yet, the same

11. A portion of this dissenting opinion was quoted with approval in *Hoffman v. Blaski*, 363 U. S. 335, 343 (1960).

12. The amendment made by the Court of Appeals to its opinion in these cases would indicate that such an unfortunate result would be required under Section 1406(a). In its original opinion, the Court of Appeals ruled that two of the wrongful death actions must be transferred to Massachusetts under 1406(a) since venue was improper in Pennsylvania (R. 77), although it held that transfer could not have been made under Section 1404(a). After the Petitions for Certiorari were filed, the Court of Appeals, at respondents' request, removed the inconsistency by withdrawing the Court's holding directing transfer of these two cases (R. 95-96).

construction should be given to both transfer provisions. If the action "could have been brought" in the transferee district within the meaning of Section 1406(a), it most certainly "might have been brought" there within the meaning of Section 1404(a).

The damages recoverable under the Massachusetts Wrongful Death Act are distributable to the persons designated in that statute irrespective of the identity of the personal representative plaintiff in whose name the action is brought. And under the Federal Rules of Civil Procedure, the identity of a nominal party is not an element of a "civil action." Thus Rule 25(b) provides:

> "If a party becomes incompetent, the Court upon motion served as provided in subsection (a) of this rule may allow *the action* to be continued by or against his representative." (Emphasis supplied.)

and Rule 25(c) provides:

> "In case of any transfer of interest, *the action* may be continued by or against the original party, unless the court upon motion directs the person to whom the interest is transferred to be substituted in *the action* or joined with the original party. . . ." (Emphasis supplied.)

Under Rules 13(h) and 24, additional parties may be brought in or may intervene in an "action." Since Massachusetts courts admittedly would have entertained actions for the wrongful deaths of plaintiffs' decedents, it is plain that these "civil actions" "might have been brought" in Massachusetts irrespective of whether or not they would have been enforceable in Massachusetts by the present plaintiffs, as opposed to some other fiduciary duly qualified in Massachusetts.[13]

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13. The Court of Appeals did not accept this contention, reasoning that the identity of nominal parties "is determinative of such basic matters as jurisdiction and venue" (R. 76). Admittedly, however, each of these requirements could have been met in Massachusetts.

Those plaintiffs, who are personal representatives are nominal parties who have no financial interest in the damages recoverable. Massachusetts courts would have entertained suits for the wrongful death of plaintiffs' decedents. All defendants might have been legally brought before the court in Massachusetts. In fact, all of them have been brought before that court in actions for wrongful death and personal injuries arising from the same crash. Massachusetts is a district which Congress has designated as being appropriate for this type of action. It is patent, therefore, that these actions "might have been brought" in Massachusetts.

B. Judicial Decisions.

The Court of Appeals ruled that this Court's decision in *Hoffman v. Blaski*, 363 U. S. 385 (1960) "compels the conclusion that respondent was without power to transfer these actions" (R. 75). Contrary to the decision below, *Hoffman v. Blaski* contains no justification for such a result. In fact, this Court's opinion in that case contains the strongest reason why the "might have been brought" phraseology is limited to venue and jurisdiction. In *Hoffman* this Court held that a district in which venue and jurisdiction were lacking was not a district in which the action "might have been brought" despite the defendant's waiver of its objections to these matters. The Court observed that to hold otherwise would be inequitable and discriminatory in that a defendant could obtain a transfer to a district in which the action could not have been prosecuted without defendant's consent. 363 U. S. 335 at 344.

The decision of the Court of Appeals in the present case does violence to reasoning of this Court in *Hoffman v. Blaski* by granting to those interested in enforcing a claim for wrongful death an absolute right to "forum shop." At the same time, the defendant is limited to the one district which the plaintiffs have selected. This right to "forum shop" may be exercised by having an appropriate person

appointed only in the district selected and by having him bring suit there. Ordinarily there are other districts in which the defendant is subject to suit, in which the wrongful death claim might be enforced, and in which the convenience of parties and witnesses and the interest of justice may require that the action be tried. However, under the ruling of the Court of Appeals, the defendant could not have the action transferred to any of them because the nominal plaintiff thus selected had not applied for an appointment in the transferee district. Since Section 1404(a) was not designed "to provide a shelter for *in rem* admiralty actions in costly and inconvenient forums," *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19, 27 (1960), the ruling by the Court of Appeals that a shelter may be found in state fiduciary law is totally unjustified.

The ruling of the Court of Appeals squarely conflicts with this Court's opinion in *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19 (1960). In that case the libellant attempted to avoid transfer by bringing suit both *in rem* against the barge and *in personam* against the barge owner. This Court held that the action "might have been brought" in the transferee district, notwithstanding the fact that plaintiff would have been unable to commence suit *in rem* against the vessel in the transferee district.

This Court reasoned that the claim against the barge was merely an alternate method of bringing the real defendant, the barge owner, into court. Since the barge owner was subject to suit in the transferee district and the substance of what had to be done to adjudicate the rights of the parties in both claims was identical, the actions "might have been brought" in the transferee district. The Court said:

> "The idea behind 1404(a) is that where a 'civil action' to vindicate a wrong—*however brought in a court*—presents issues and requires witnesses that make one District Court more convenient than another, the trial judge can, after findings, transfer the whole

action to the more convenient court." 364 U. S. 19, 26. (Emphasis supplied.)

Similarly, those interested in enforcing these wrongful death claims could have brought defendants into court by naming as party-plaintiff a personal representative qualified under the laws of Massachusetts. Their choice of a Pennsylvania rather than a Massachusetts personal representative should not bar transfer now, particularly since the cases present issues and require witnesses which make the District of Massachusetts much more convenient than the Eastern District of Pennsylvania.

Nearly all of the courts which have interpreted Section 1404(a) have concluded that the existence of potential defenses in the transferee district, other than those of venue and jurisdiction, do not bar transfer.[14] Transfers have been ordered even though the court of the transferee district, unlike the court of the district chosen by plaintiff, would probably rule that plaintiff had no cause of action;[15] even though plaintiff contended that the damages recoverable in the transferee forum would be less than those recoverable in the transferor forum;[16] and even though the actions would have been barred by the statute of limitations applicable in the transferee district.[17] These decisions do not result

14. To the extent that the decision of *R. F. Felchlin v. The American Smelting and Refining Company*, 136 F. Supp. 577 (S. D. Cal. 1955), holds to the contrary, petitioners submit that the case was wrongly decided. It is distinguishable in that under the law of Texas, the transferee forum in that case, a suit brought by a foreign personal representative is a nullity and the complaint cannot be amended to show that the plaintiff later obtained ancillary letters of administration. *Pirkle v. Cassity*, 104 F. Supp. 318 (E. D. Tex. 1952). The law of Massachusetts does permit such an amendment. See pages 22 and 23, *infra*.

15. *Ackert v. Van Pelt Bryan*, 299 F. 2d 65 (2d Cir. 1962); *Clayton v. Warlick*, 232 F. 2d 699 (4th Cir. 1956).

16. *Goranson v. Kloeb*, 308 F. 2d 655 (6th Cir. 1962).

17. *H. L. Green Co. v. McMahon*, 312 F. 2d 650 (2d Cir. 1962); *Headrick v. Atchison, T. & S. F. R.*, 182 F. 2d 305 (10th Cir. 1950); *Gomez v. The S. S. Dorothy*, 183 F. Supp. 499 (D. Puerto Rico, 1959); *Crawford v. The S. S. Shirley Lykes*, 148 F.

in prejudicing the legitimate interests of the parties. The courts ordering transfer have, in the exercise of their discretion, utilized techniques and legal principles which permit transfer but prevent it from becoming a method of defeating a party's claim. See pages 20 and 21, *infra*.

II. Efficient Administration of the Federal Courts Compels the Conclusion That These Actions Might Have Been Brought in Massachusetts.

If any ambiguity exists in the "might have been brought" phraseology, it most certainly should be resolved in favor of the Congressional purpose of reducing the wastefulness of time, energy and money involved in duplicating litigation in the federal courts. The Court of Appeals did precisely the contrary. It recognized that its ruling would curtail the application of Section 1404(a) (R. 76-77). However, it said it could not presume that Congress intended to alter state policy by permitting transfer of representative suits to courts in states which do not permit a personal representative to bring suit by virtue of his foreign appointment (R. 76-77).

This Court consistently has rejected such restrictive constructions of transfer statutes based upon legal principles which are irrelevant or inapplicable to the procedural reforms desired by Congress. In *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19 (1960), for example,[18] this Court followed the "common-sense approach" in interpreting Section 1404(a) since "failure to do so would prac-

Supp. 958 (S. D. N. Y. 1957); *Curry v. States Marine Corp. of Delaware*, 118 F. Supp. 234 (S. D. N. Y. 1954); *Frechoux v. Lykes Bros. S. S. Co.*, 118 F. Supp. 234 (S. D. N. Y. 1953); *Greve v. Gibraltar Enterprises*, 85 F. Supp. 410 (D. N. M. 1949).

18. In *Norwood v. Kirkpatrick*, 349 U. S. 29 (1955), this Court refused to limit the discretion of district judges by application of the standards existing under the doctrine of *forum non conveniens*. In *Goldlawr, Inc. v. Heiman* 369 U. S. 463 (1962), this Court held that traditional conceptions of personal jurisdiction in the transferor court were irrelevant to the Congressional purpose of permitting transfer to a district in which venue and jurisdiction were present.

tically scuttle the *forum non conveniens* statute so far as admiralty actions are concerned." 364 U. S. 19 at 26.

There is even greater reason for the same common-sense approach in interpreting Section 1404(a) in these cases. The ruling of the Court of Appeals would nullify the statute in nearly every case in which a fiduciary is a party. It also would needlessly burden the courts with duplicating litigation in the types of cases in which the provisions of Section 1404(a) are most needed.

The provisions of Section 1404(a) are particularly important to the administration of the federal courts in wrongful death and related litigation arising from disasters such as mass-transportation accidents and explosions. In this type of litigation, of which the cases at bar are excellent examples, the facts determinative of liability in all claims must be established by substantially the same witnesses, even though some of the claims may be for death, others for personal injury and still others for property loss. In such cases, vast economies can be effected in judicial time and effort as well as in that of numerous members of the public serving as witnesses, jurors and advisors to the litigants by consolidating the cases in one district for pretrial procedures and for the trial of liability issues.

Under the ruling of the Court of Appeals, potential transferee districts are limited to those few jurisdictions located in the seven states which permit a foreign fiduciary to obtain judgment in wrongful death actions by virtue of his foreign appointment.[19] Of the remaining forty-four of the fifty-one jurisdictions, twenty-three require the for-

19. Arizona, Ariz. Rev. Stat. Ann. § 12-612 (1956); Delaware, Del. Code Ann. tit. 12, § 1561 (1953); Iowa, *Gross v. Hocker*, 243 *Iowa* 291, 51 N. W. 2d 466 (1952); Michigan, *Siverling v. Lee*, 90 F. Supp. 659 (D. C. Mich. 1950); *Cardor v. Marhoff*, 143 F. Supp. 920 (D. C. Mich. 1956); Missouri, *Demottei v. Missouri-Kan. Tex. R. R.*, 345 Mo. 1136, 139 S. W. 2d 504 (1940); New Mexico, *Henkel v. Hood*, 49 N. M. 45, 156 P. 2d 790 (1945); Wisconsin, *Robertson v. Chicago, St. P. M. & O. R. R.*, 122 Wisc. 66, 99 N. W. 1135 (1904).

eign fiduciary to obtain ancillary appointment in connection with suits under the state's wrongful death act,[20] nineteen require other affirmative preliminary acts, such as filing of foreign letters, appointing a resident agent for service of process and filing bond[21] and two do not permit

20. Alaska, Alaska Comp. Laws Ann. § 61-3-2 (Supp. 1958); California, Cal. Civ. Prac. Code § 1913; Prob. Code §§ 360, 362, 400, 405, 407, 420 (1956); Connecticut, Conn. Gen. Stat. Ann. § 52-21; § 45-208 (1960); Hawaii, Hawaii Rev. Laws § 317-9 (1955); Idaho, Idaho Code Ann. § 15-220, 222, 317 (1948); Kentucky, Ky. Rev. Stat. § 394.150, § 395.005 (1955); Maine, Me. Rev. Stat. Ann. Ch. 154, §§ 14, 15, 17, 62 (1954); Maryland, Md. Ann. Code art. 93, §§ 45, 57, 368 (1957); Massachusetts, Mass. Gen. Laws Ann. ch. 191, § 5; ch. 192, §§ 4, 5, 9, 11 (1955); Montana, Mont. Rev. Code Ann. § 91-1001 (Supp. 1961); § 91-1002, 1301, 1302, 1405 (1949); Nevada, Nev. Rev. Stat. § 136.260, § 138.020, § 139.010 (1961); North Carolina, N. C. Gen. Stat. § 28-8 (1950); § 28-186 (Supp. 1961); § 31-23, 27 (1950); Oregon, Ore. Rev. Stat. § 115.160, 190, 410 (1961); Rhode Island, R. I. Gen. Laws Ann. § 33-7-18, 21; § 33-8-7; § 33-18-9 (1957); South Carolina, S. C. Code § 19-281 (1952); § 19-591 (Supp. 1962); Tennessee, Tenn. Code Ann. § 30-105, 106; 32-501 (1955); 35-610 (Supp. 1960); Texas, Tex. Prob. Code §§ 78, 95, 105 (1956); Utah, Utah Code Ann. § 75-3-22, 23, 24; 75-3-15; 75-4-4 (1953); Vermont, Vt. Stat. tit. 4, ch. 313; tit. 14, ch. 902 (1958); tit. 14, ch. 904 (Supp. 1961); Virginia, Va. Code Ann. § 26-59 (Supp. 1960); § 64-88 (1949); Washington, Wash. Rev. Code § 11.20.090, § 11.28.010; § 11.36.010 (1951); West Virginia, W. Va. Code ch. 41, art. 5, § 4073; ch. 44, art. 5, § 4207 (1961); Wyoming, Wyo. Stat. Ann. § 2-52, 68, 95, 106 (1959).

21. Alabama, Ala. Code tit. 61, § 151 (1960); Arkansas, Ark. Stat. § 27-805 (repl. vol. 1962); District of Columbia, D. C. Code Ann. § 20-504, 505 (1961); Florida, Fla. Stat. § 734.30 (Supp. 1961); Georgia, Ga. Code § 113-2401, 2402, 2403, 2405 (1933); Illinois, Ill. Rev. Stat. ch. 3, § 265.416 (1961); Indiana, Ind. Ann. Stat. § 7-752 (repl. vol. 1953); Kansas, Kan. Gen. Stat. Ann. § 59-1707, 1708 (1949); Minnesota, Minn. Stat. § 573.05 (1947); Mississippi, Miss. Code Ann. § 622 (1957); Nebraska, Neb. Rev. Stat. § 30-303, 807 (1956); New Hampshire, N. H. Rev. Stat. Ann. § 553:14 (1955); *Ghilgin v. Couture*, 84 N. H. 48, 146 Atl. 395 (1929); New Jersey, N. J. Rev. Stat. § 3A:12-7 (1953); New York, N. Y. Surr. Ct. Act. §§ 159, 167 (1953), § 160 (Supp. 1961); North Dakota, N. D. Rev. Code § 30-11-03, 19; § 30-24-18 (1960); Ohio, Ohio Rev. Code Ann. § 2109.04; § 2113.75 (1954); Oklahoma, Okla. Stat. tit. 58, § 262, § 171-88 (1937); Pennsylvania, Pa. Stat. tit. 20, § 320.1101 (Supp. 1961); South Dakota, S. D. Code § 35.0902 (Supp. 1960).

suit in the name of the fiduciary.[22] Of the same fifty-one jurisdictions, only one permits the foreign fiduciary to obtain a judgment by virtue of his foreign appointment in actions other than for wrongful death,[23] thirty require the foreign fiduciary to obtain ancillary appointment,[24] and twenty require other affirmative preliminary acts such as filing of foreign letters, appointing a resident agent for service of process and filing bond.[25] Thus the extent to which Section 1404(a) would be circumscribed by the ruling of the court below is readily apparent.

The practical effect of the ruling is not limited to death claims in the usual context of disaster litigation. Although the ruling raises no bar to the transfer of other claims, the advantages to be derived from their consolidation with other suits pending in the transferee district will no longer be available since the death cases must in any event remain in the inconvenient transferor district. Thus in the present cases, for example, the Court of Appeals has urged the District Court to reconsider its order transfer-

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22. Colorado, Col. Rev. Stat. Ann. § 41-1-1, 2 (1953); Louisiana, La. Civ. Code Ann. art. 2315 (West Supp. 1961).

23. Delaware, Del. Code Ann. tit. 12, § 1561 (1953).

24. In addition to those jurisdictions referred to in footnote 20, *supra*, the following States require the foreign fiduciary to obtain ancillary appointment in actions other than for wrongful death: Arizona, Ariz. Rev. Stat. Ann. § 14-341, 342 (1956); Iowa, Iowa Code § 633.33, 34, 45, 50 (1950); Louisiana, La. Code Civ. Proc. Ann. arts. 3081, 3097 (West 1961); La. Civ. Code Ann. art. 1596 (West 1952); La. Rev. Stat. Ann. § 9:2401, 2421, 2422, 2423 (1951); Michigan, Mich. Stat. Ann. § 27.3178 (98), (100), (278) (1943); Missouri, Mo. Rev. Stat. § 473.117, 667; § 474.380 (1956); New Hampshire, N. H. Rev. Stat. Ann. § 551:5; § 553:5; § 554:28 (1955); New Mexico, N. M. Stat. Ann. § 31-1-4, 5, 6; § 31-2-1. (1954).

25. The jurisdictions requiring other affirmative preliminary acts in actions other than for wrongful death are the same as those referred to in footnote 21, *supra*, with the following changes: add, Colorado, Col. Rev. Stat. Ann. § 152-6-7, 8 (1953) and Wisconsin, Wisc. Stat. § 287.16 (1958); delete, New Hampshire.

ring the personal injury claims, in view of the Court's ruling with respect to the death cases (R. 77).

The increased cost of litigation which the court's ruling will create will be borne not only by large corporations, but by individuals as well, such as those involved in accidents of automobiles or private aircraft. It will also be borne by the United States, which, under the Federal Tort Claims Act, may be sued in any state in which the plaintiff resides. The savings to be effected by consolidating duplicating litigation in one district is particularly important to the United States as a litigant. Perhaps of greatest public importance will be the inability of district judges, as a result of the Court's ruling, to utilize Section 1404(a) to alleviate the burdens on the federal judicial system which duplicating litigation needlessly imposes.

Construing 1404(a) to meet the needs of the administration of the federal courts need not result in prejudice to any party by reason of potential defenses in the transferee district. Numerous techniques and principles, other than barring transfer as a matter of law, are available and have been used by district courts to prevent transfer from becoming a method of defeating a party's claim. In *Continental Grain Co. v. Barge FBL—585*, 364 U. S. 19, 27 (1960), the libellant's interest in the *in rem* action was protected by the owner's promise to pay any final decree which might be rendered against the barge.[26] In the cases at bar, the district court ruled that defendants, by requesting these transfers, will be estopped from objecting to the capacity of the personal representative plaintiffs to proceed in these actions (R. 20). This principle has been used by other district courts.[27] Where the action might be barred

26. In *Torres v. Walsh*, 221 F. 2d 319 (2d Cir. 1955), *cert. denied*, 350 U. S. 836, the filing of such a stipulation was made an express condition of transfer to a district where *in rem* jurisdiction could not have been acquired.

27. See, e.g., *Greve v. Gibraltar Enterprises*, 85 F. Supp. 410, 414 (D. N. M. 1949).

by the statute of limitations in the transferee district, some courts have ordered transfer on the condition that defendant agree to waive this defense.[28] Still others have met the problem by ruling that under Section 1404(a) the transferee district must apply the same law in the trial of the case as would have been applied if the case had been tried in the district in which the case was originally instituted.[29]

These considerations compel the conclusion that the "might have been brought" requirement should be interpreted to be limited to the requirements of venue and jurisdiction. This interpretation preserves the plaintiff's choice among districts of proper venue, but prevents abuse of that choice. It will enable district judges to relieve the federal courts of unnecessary duplication of litigation. At the same time, it will permit district judges, in their discretion, to insure that transfer is not being used to defeat a party's claim.

III. These Actions Might Have Been Brought in Massachusetts by These Plaintiffs Irrespective of Defendants' Consent.

These plaintiffs might have brought the present actions in Massachusetts whether or not defendants had raised objections to their capacity to bring them. Plaintiffs would only have had to obtain ancillary appointments by the presentation of a petition for administration in the county in which the decedents' deaths occurred in compliance with routine formalities.[30] The Court of Appeals acknowledged that "it is quite likely" that such appoint-

28. *Hokanson v. Helene Curtis Industries, Inc.*, 177 F. Supp. 701 (S. D. N. Y. 1959); *May v. The Steel Navigator*, 152 F. Supp. 254 (D. C. N. Y. 1957); *Crawford v. The S. S. Shirley Lykes*, 148 F. Supp. 958 (D. C. N. Y. 1957).

29. *H. L. Green Co., Inc. v. McMahon*, 312 F. 2d 650 (2d Cir. 1962); *Headrick v. Atchison, T. & S. F. Ry.*, 182 F. 2d 305 (10th Cir. 1950).

30. Mass. Gen. Laws Ann., Chapters 193, 194 and 195, § 8.

ments could have been obtained (R. 76). In fact, this is a virtual certainty. Plaintiffs in three of these death actions instituted in Pennsylvania, who are citizens of Pennsylvania with Pennsylvania domiciliary appointments, actually did obtain ancillary appointments in Massachusetts. They brought suits in that district against three of the defendants, having brought suit against the fourth, Eastern Air Lines, Inc., in the Eastern District of Pennsylvania.[31]

Their capacity to bring the actions could not be successfully attacked even if the ancillary appointments were obtained after their suits were instituted. In *Boudreau v. New England Transportation Company*, 315 Mass. 423, 53 N. E. 2d 92 (1944), plaintiff, a Rhode Island administratrix, commenced a timely suit in Massachusetts under the Massachusetts Wrongful Death Act. After the statute of limitations had expired, plaintiff was allowed to amend her writ to show her appointment as an ancillary administratrix in Massachusetts. Defendant appealed on the ground that no amendment could be made because the original writ was a nullity, having been instituted by a person having no capacity. The court held, however, that the amendment was properly made for the following reasons:[32]

> ". . . This is not a case where there was no plaintiff in existence when the action was brought. The plaintiff was a live person in whatever capacity she was acting or purporting to act. The question was

31. See footnotes 5 and 6, at pp. 8 and 9, *supra*.

32. The court also held that plaintiff, having a Rhode Island appointment, was conclusively presumed to have capacity to bring the action in Massachusetts because the defendant failed to plead this defense in compliance with Chapter 231, Section 30, *Mass. Gen. Laws Ann.* Plaintiffs seek to avoid the holding of *Boudreau* by pointing out that Chapter 231, Section 30, *Mass. Gen. Laws Ann.* has been amended so that the objection to a lack of capacity might be made at any time. This is irrelevant to plaintiffs' right to bring these actions because the complaint could be amended at any time the objection is raised.

whether she had the capacity to maintain the action. She could assert that she had and could bring the action and try the issue of her competency to maintain it. *The action was therefore not a mere nullity but was from the first a genuine lawsuit and an adequate basis for an amendment alleging an appointment in the State of the forum when such appointment was secured.* (Emphasis supplied.)

Under Massachusetts law, therefore, it is clear that these plaintiffs could have brought these actions against defendants in the District of Massachusetts whether or not defendants chose to raise or waive their objections to plaintiffs' capacity.

In any event, plaintiffs' self-imposed lack of capacity to maintain suit in Massachusetts should not bar transfer now. If plaintiffs lack capacity to sue in Massachusetts, they are equally without capacity in Pennsylvania. Pennsylvania law requires that suit be brought by a person duly qualified under Massachusetts law.[33] They cannot now claim that their lack of capacity bars transfer to Massachusetts when the same defect would prevent maintenance of these suits in Pennsylvania.

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33. Rule 2207 of the Pennsylvania Rules of Civil Procedure provides as follows:

> "When an action to recover damages for wrongful death is brought in this Commonwealth to enforce rights arising under the laws of some other jurisdiction it shall be brought by the person authorized to bring the action by the law of the jurisdiction where the cause of action arose."

The Massachusetts courts have ruled that under its wrongful death statute suit may be brought only by a personal representative duly qualified in Massachusetts. *Boutilier v. Wesinger*, 322 Mass. 495, 78 N. E. 2d 195 (1948); *Brown v. Boston & Maine Railroad*, 283 Mass. 192, 186 N. E. 59 (1933). Rule 2207 requires appointment in the jurisdiction in which the cause of action arose even if the plaintiff was duly qualified in Pennsylvania. *Brennan v. Rooney*, 139 F. Supp. 484 (E. D. Pa. 1956).

CONCLUSION.

The need for reversal of the decision of the Court of Appeals is compelling. The decision of the District Court in transferring these cases to Massachusetts would serve the design of Congress in enacting Section 1404(a) by eliminating unnecessary waste of time, energy and money which the ruling of the Court of Appeals will require. Congress has designated the district of Massachusetts as a district in which this litigation "may be brought." It has authorized transfer if the action "might have been brought" there. In fact, numerous actions arising from the same crash have been brought there against these defendants. To say that the actions may not be transferred to Massachusetts because they might not have been brought there contradicts common sense, the manifest intent of Congress and the applicable decisions of this Court. The decision below is erroneous and should be reversed.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 80

FRANCIS E. VAN DUSEN, UNITED STATES DISTRICT JUDGE, ET AL., PETITIONERS

v.

ROBERTA BARRACK, ADMINISTRATRIX, ETC., ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR PETITIONERS[1]

OPINIONS BELOW

The opinion of the United States District Court for the Eastern District of Pennsylvania (R. 1–20) is reported *sub nom. Popkin* v. *Eastern Air Lines, Inc.*, at 204 F. Supp. 426. The opinion of the court of appeals (R. 72–77) is reported at 309 F. 2d 953.

[1] This brief in No. 80 is being filed by the Solicitor General on behalf of the United States as defendant in the underlying actions and on behalf of Judge Van Dusen as defendant in the mandamus proceeding. A separate brief in No. 56, seeking reversal of the same judgment of the court of appeals, is being filed on behalf of Judge Van Dusen and the other defendants-intervenors (General Motors Corporation, Eastern Air Lines, Inc., and Lockheed Aircraft Corporation).

JURISDICTION

On December 7, 1962, the court of appeals, pursuant to its opinion of November 19, 1962 (R. 72–77), ordered the issuance of a writ of mandamus (R. 78–79). On December 14, 1962, the clerk of the court of appeals issued the peremptory writ of mandamus (R. 80–81), which was later stayed pending review in this Court (R. 93–94). On February 21, 1963, the court of appeals amended its opinion (R. 95–96). The petition for a writ of certiorari was granted on April 15, 1963 (R. 98). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTION PRESENTED

Wrongful death actions were brought by decedents' personal representatives in the United States District Court for the Eastern District of Pennsylvania. The district judge found the District of Massachusetts to be a more convenient forum. The question presented is whether Section 1404(a) of the Judicial Code, authorizing transfer of a federal civil action to a more convenient district "where it might have been brought," is unavailable here to permit transfer to the District of Massachusetts because the plaintiffs, before commencing suit, had not obtained appointment as personal representatives in Massachusetts.

STATUTE INVOLVED

Section 1404(a) of the Judicial Code (28 U.S.C. 1404(a)) provides:

> For the convenience of parties and witnesses, in the interest of justice, a district court may

transfer any civil action to any other district or division where it might have been brought.

STATEMENT

On October 4, 1960, a commercial airliner headed from Boston to Philadelphia crashed into Boston Harbor shortly after take-off from Logan International Airport in Boston. More than 150 actions for personal injury and wrongful death caused by the accident have been brought against the operator of the aircraft (Eastern Air Lines, Inc.), its manufacturer (Lockheed Aircraft Corporation), the manufacturer of the aircraft's engines (General Motors Corporation), the United States, and, in some cases, the Massachusetts Port Authority (which operated Logan Airport). More than 100 of these actions were brought in the United States District Court for the District of Massachusetts (R. 2). In addition, 40 actions for wrongful death and 5 suits for personal injuries arising out of the crash were begun in the United States District Court for the Eastern District of Pennsylvania.[2] This case concerns the 40 wrongful death actions brought in Pennsylvania. Essentially, plaintiffs in all the actions arising out of the disaster alleged that the negligence of all the defendants had caused the aircraft's engines to ingest some birds in flight, causing the aircraft to crash.[3]

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[2] Originally there were 55 actions in the Eastern District of Pennsylvania. Ten of these, however, were disposed of by remand to a state court, dismissal, settlement, or transfer for improper venue.

[3] Jurisdiction with respect to the corporate defendants was based on diversity of citizenship. Jurisdiction with respect to the United States was based on the Federal Tort Claims Act.

The defendants moved under 28 U.S.C. 1404(a) for transfer of all the Pennsylvania actions to the District of Massachusetts. After a thorough review of the facts relating to the relative convenience and justice of the two forums, the district judge (Van Dusen, J.) granted the motions for transfer (R. 4–20). Judge Van Dusen found that transfer to the situs of the accident, where most of the actions had been brought, would impose no serious burden on the plaintiffs, would significantly serve the convenience of most of the witnesses, and would advance the interests of justice by permitting consolidation of all cases arising from the same accident in a court familiar with the applicable law, thus conserving time, reducing expense and leading to uniform and consistent results. The District of Massachusetts, to which transfer was ordered, was a proper venue as to all the actions against all the defendants[4] and was a forum having jurisdiction over the person of all the defendants in all the actions. It was the only such jurisdiction.

The United States is charged with tort liability for the alleged negligence of government air traffic controllers in permitting the aircraft to come into contact with the ingested birds. In addition, there are allegations that the government negligently certified as safe the type of aircraft involved, and negligently failed to maintain safe conditions at the Boston airport.

[4] As to the private defendants, the District of Massachusetts was a proper venue under 28 U.S.C. § 1391(a), (c). As to the United States, it was a proper venue under 28 U.S.C. § 1402(b), and as to the Massachusetts Port Authority, it was the only proper venue under 28 U.S.C. § 1391(a).

The district court rejected an argument made by some of the plaintiffs that, considerations of convenience and justice notwithstanding, transfers from Pennsylvania to Massachusetts could not be ordered pursuant to Section 1404(a) in instances where the plaintiffs had failed to qualify, in advance of suit, as Massachusetts administrators. The district judge held that, according to the "common sense approach" to Section 1404(a) required by this Court's decision in *Continental Grain Co.* v. *Barge FBL–585*, 364 U.S. 19, these actions could be transferred to Massachusetts despite this failure (R. 19–20). He found that, under Massachusetts law, plaintiffs' lack of Massachusetts appointment was not a jurisdictional defect and could be cured by subsequent appointment should a defense be raised on that ground. The court held that, in any case, "the defendants, by requesting these transfers, will be estopped from objecting to the capacity of the personal representative plaintiffs to proceed in these actions" after transfer (R. 20).

Plaintiffs petitioned the Court of Appeals for the Third Circuit for writs of mandamus and prohibition to prevent the transfers (R. 22–48). That court granted the writ of mandamus with respect to 37[1] death actions in which the plaintiffs had not qualified as Massachusetts administrators before bringing suit in Pennsylvania (R. 84–92). The court of appeals recognized that venue and personal jurisdiction would

[1] The writ was not granted with respect to one action in which plaintiff had qualified as a Massachusetts administrator and two actions where venue was improper in the Eastern District of Pennsylvania (R. 77, 95–96).

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have been proper in Massachusetts, and acknowledged that appointment of the plaintiffs as Massachusetts administrators would "quite likely" be granted if sought by them. Nevertheless, it believed that it was compelled by this Court's decision in *Hoffman* v. *Blaski*, 363 U.S. 335, to decide that the District of Massachusetts was not a district where these suits "might have been brought", within the meaning of Section 1404(a) because each plaintiff lacking Massachusetts appointment did not have *"an unqualified right to bring suit* in the transferee forum [the District of Massachusetts] at the time he filed his original complaint" in the Eastern District of Pennsylvania (R. 75, 76, original emphasis).[*]

SUMMARY OF ARGUMENT

The court of appeals has prevented transfer of these actions to the District of Massachusetts because of plaintiffs' failure, before bringing suit in Pennsylvania, to qualify as Massachusetts administrators. The court held that Massachusetts was therefore not a district where the actions "might have been brought." This decision was wrong because the limitation in Section 1404(a) does not have reference to

[*] Plaintiffs also sought to overturn the district court order on the grounds (1) that, as a matter of law, transfer was precluded by the possibility that the Massachusetts court would apply a rule of substantive law (on the question of damages) different from that applicable in Pennsylvania, and (2) that, in any event, the district court abused the discretion conferred upon it by 28 U.S.C. 1404(a) in ordering transfer in the circumstances of these cases. The court of appeals declined to pass on these alternative arguments in light of its holding that the district court lacked the power to transfer these representative actions (R. 73).

conditions for bringing suit under state law, but was designed only to limit transfer to transferee districts designated by federal law as places where the action "may be brought." In this case the District of Massachusetts was designated in the applicable federal venue statutes as a place where the actions "might have been brought." The District of Massachusetts also had jurisdiction over the person of all the defendants and had jurisdiction over the subject matter. Therefore transfer was proper once it was found by the district court to be in the interests of convenience and justice. This Court's decision in *Hoffman* v. *Blaski*, 363 U.S. 335, is entirely consistent with this conclusion.

In addition, the court of appeals' decision conferred discriminatory power to select the forum upon the plaintiffs in these cases in violation of the decision in *Hoffman* v. *Blaski*. Under the court of appeals' decision the plaintiffs here had the power unilaterally to prevent transfer to a more convenient and proper federal venue simply by omitting to qualify to sue in Massachusetts, when they did not wish the District of Massachusetts to be the place of trial.

We also question whether mandamus was an appropriate remedy in this case. The doubts on this score which are suggested by *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, are greatly strengthened by the consideration that Congress has since provided an appellate remedy—the Interlocutory Appeals Act—which respondents failed to pursue. We do not urge, however, that the court of appeals lacked jurisdiction (in the fundamental sense

of that term) and that this Court is therefore required to set aside the writ of mandamus without considering the merits of the transfer issue.

ARGUMENT

INTRODUCTION

Section 1404(a) of the Judicial Code provides for transfer of federal civil actions from one district to another when transfer of venue would be "for the convenience of parties and witnesses, in the interest of justice." Its aim is to prevent the waste "of time, energy and money" and "to protect litigants, witnesses and the public against unnecessary inconvenience and expense." *Continental Grain Co.* v. *Barge FBL–585*, 364 U.S. 19, 26, 27. Transfer under the statute, however, may only be made to districts where the action "might have been brought." This is the third case which has come before this Court concerning the meaning of the statutory limitation, "where it might have been brought." The other two were *Hoffman* v. *Blaski*, 363 U.S. 335, prohibiting transfer because of the statutory limitation, and *Continental Grain Co.* v. *Barge FBL–585*, 364 U.S. 19, permitting transfer despite the limitation.

The district court here has ordered 40 wrongful death actions arising out of a single airline disaster transferred to the District Court for the District of Massachusetts, where the crash occurred and where more than 100 actions arising from the crash have already been brought. After careful consideration Judge Van Dusen found, as the statute requires, that transfer would serve the interests of convenience and

justice. That finding is not in question on this petition. The court of appeals has held, however, that despite the interests of convenience and justice, this Court's decision in *Hoffman* v. *Blaski*, *supra*, required it to prohibit the transfers, and it has issued a writ of mandamus so directing the district judge. It is the view of the United States, speaking on its own behalf as a defendant in the underlying actions and representing the district judge against whom the writ of mandamus has been issued, that the statutory limitation does not prevent transfer in this case.

The decision of the court of appeals preventing tranfer turns to a large extent upon the posture of the case under state law. Although we contend that limitations imposed by state law are not ultimately relevant in determining "where it might have been brought," the argument of the case is advanced by summarizing the applicable state law and its relationship to each of the cases. Indeed, such a summary alone is enough to demonstrate the error of the court of appeals' decision.

The 40 death actions involved in this case were brought by personal representatives, only one of whom had formally qualified to act as a personal representative in Massachusetts when the suits were brought.[7] Under Massachusetts law, which would be applicable in the federal district court in Massachusetts in these cases,[8] the failure of an out-of-state personal representative to obtain appointment as a Massachusetts administrator before bringing a wrongful death action

[7] (R. 77)

[8] See Rule 17(b), F.R. Civil P.

under Massachusetts law would be subject to a potential defense on the ground of lack of capacity to sue.[9] However, even if the defense of lack of capacity is raised in time, an out-of-state representative plaintiff may save his action by obtaining subsequent appointment as a Massachusetts administrator.[10] Such a subsequent appointment relates back in time to the institution of the action.[11] Moreover, if the defense of lack of capacity is not raised in time it is waived,[12] and the court will not raise it on its own motion.[13] Therefore, had plaintiffs' death actions originally been brought in Masachusetts, defendants in this case would have had a defense on the ground of plaintiffs' failure to be appointed as Massachusetts administrators only if (1) the plaintiffs had not obtained Massachusetts appointment before bringing suit, (2) the defense were raised in time and (3) the plaintiffs failed to obtain Massachusetts appointment after being met with the defense. Appointment as a Massachusetts administrator, if sought originally or if required by defendants' objection, would technically be in the discretion of the Massachusetts probate court.[14]

Plaintiffs, however, did not originally sue in Massachusetts, but in Pennsylvania. Therefore, they did not seek Massachusetts appointment before bringing

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[9] *Boutillier* v. *Wesinger*, 322 Mass. 495.

[10] *Boudreau* v. *New England Transp. Co.*, 315 Mass. 423.

[11] *Id.* at pp. 426–427.

[12] *Id.* at pp. 425–426; *Boutillier* v. *Wesinger*, *supra*; Ann. Laws of Mass. c. 231 § 30.

[13] *Budreau* v. *New England Transp. Co.*, *supra*; *Boutillier* v. *Wesinger*, *supra*.

[14] See *Morgan* v. *Morgan*, 267 Mass. 388.

their suits. Nor did they seek Massachusetts appointment when defendants moved for transfer to Massachusetts, which plaintiffs opposed. Nevertheless, the court of appeals has held plaintiffs' failure to obtain Massachusetts appointment before bringing these suits in Pennsylvania to be fatal to transfer under Section 1404(a). Under the court of appeals' interpretation of the statute, the District Court of Massachusetts was not a district where these actions "might have been brought," because, under Massachusetts law technically placing plaintiffs' capacity to sue in the discretion of the probate court, each plaintiff did not have *"an unqualified right to bring suit* in the transferee forum at the time he filed his original complaint."[15] The court of appeals believed this rule to be required by this Court's decision in *Hoffman* v. *Blaski*, 363 U.S. 335.

The court of appeals found no reason to suppose that all the plaintiffs could not in fact have obtained Massachusetts appointment had they wished to bring suit in Massachusetts. There is no indication in the record that Massachusetts appointment had been denied to any plaintiff, nor is any reason given why appointment would be denied. In its opinion the court of appeals said, "Of course, it is quite likely that most of these petitioners would have been so ap-

[15] R. 75. The court of appeals apparently derived this test from the court's statement in *Hoffman* that "Inasmuch as the respondents (plaintiffs) did not have a right to bring these actions in the respective transferee districts, it follows that the judgments of the Court of Appeals [prohibiting transfer] were correct * * *" (363 U.S. at 344). As we show *infra*, pp. 13–22, the court's reference in *Hoffman* was to a "right" under federal venue provisions, not to an "unqualified right" under state law.

pointed."[16] Moreover, the fact is that in none of these cases can a failure to obtain Massachusetts appointment actually prevent the action from going forward in Massachusetts after transfer, for in granting defendants' motion to transfer Judge Van Dusen estopped defendants from later objecting to the capacity of the plaintiffs to sue in Massachusetts, thus making plaintiffs' possible failure to obtain Massachusetts appointment wholly irrelevant to the conduct of the litigation after transfer.

To summarize, transfer has thus been prohibited because of plaintiffs' failure to qualify to sue in Massachusetts before actually suing in Pennsylvania. The failure to obtain Massachusetts appointment concededly cannot now have any effect whatsoever upon the conduct of the transferred litigation. It is the position of the United States that the words of Section 1404(a) obviously should not and in fact do not absolutely prohibit transfer in those circumstances. We agree, that, as the court of appeals held, the words, "where it might have been brought," have reference to a situation "at the time [plaintiff] filed his original complaint." But we will show that the limitation is a reference, not to qualifying provisions of state law, but to places designated as appropriate venues by the federal venue statutes. That is, the limitation in Section 1404(a) is a federal venue limitation and the words, "where it might have been brought," permit transfer to districts designated by federal venue statutes at the time of suit as places where such an action "may be brought." Under the applicable federal venue statutes, all of these

[16] R. 76.

actions originally "might have been brought" in the District Court of Massachusetts." The District Court of Massachusetts is therefore a place to which these actions may now be transferred under Section 1404(a).

This interpretation does not mean that a possibility that some plaintiffs might be denied Massachusetts appointment should have been ignored in Judge Van Dusen's decision whether or not to transfer these cases, and it was not ignored. Although irrelevant to whether the actions "might have been brought" in Massachusetts, a state law under which plaintiffs might not have the capacity to go forward with the action in Massachusetts after transfer would be relevant to whether transfer would be consistent with "the convenience of the parties * * * [and] the interest of justice." Judge Van Dusen, however, fully satisfied the interest of justice in this case by holding that the defendants, by requesting transfer to Massachusetts, were thereafter estopped from objecting to the plaintiff's capacity to sue there.[18] Provisions of state law [redacted] do not absolutely prohibit transfer when the interests of justice can thus be satisfied.

I

"WHERE IT MIGHT HAVE BEEN BROUGHT" HAS REFERENCE TO THOSE DISTRICTS IN WHICH CONGRESS HAS PROVIDED THE ACTION "MAY BE BROUGHT." THE PHRASE DOES NOT HAVE REFERENCE TO STATE LAW

The meaning of the limitation, "where it might have been brought," appears from the history of the

[17] See note 4, *supra*.

[18] (R. 20.) See *supra*, p. 5.

transfer statute, its function, and this Court's decisions. Section 1404(a) was first enacted as part of the 1948 Judicial Code. According to the Reviser's Note, the Section "was drafted in accordance with the doctrine of *forum non conveniens.*" Under that judicially evolved doctrine an action brought in an inconvenient, rather than a more convenient, forum might be dismissed to be reinstituted in the more convenient forum. In applying *forum non conveniens* it was important whether the action, if dismissed, could be brought anew in another forum. If it could not, application of the doctrine might result in the plaintiff's losing his cause of action altogether. As this Court thus said in a leading *forum non conveniens* case before the enactment of Section 1404(a), "[i]n all cases in which the doctrine of forum non conveniens comes into play, it presupposes at least two forums in which the defendant is amenable to process; the doctrine furnishes criteria for choice between them." *Gulf Oil Corp.* v. *Gilbert,* 330 U.S. 501, 506–507."

When the enactment of Section 1404(a) changed the *forum non conveniens* remedy from dismissal to transfer, there was no need for Congress to be con-

[19] In order to permit invocation of the doctrine of *forum non conveniens* while avoiding injustice to a plaintiff forced originally to bring his suit in an inconvenient forum by his inability to serve defendant elsewhere, it was, in fact, not unusual for the inconvenient court to dismiss only upon the condition that the defendant voluntarily submit himself to the jurisdiction of the more convenient forum. See cases cited in Mr. Justice Frankfurter's dissenting opinion in *Sullivan* v. *Behimer,* 363 U.S. 351, at 364–365.

cerned, as the courts had formerly been, with whether the plaintiff could formally reinstitute his action in the transferee forum after transfer. A transferred action could proceed immediately in the transferee forum without being brought a second time. Therefore, it is plain, and no one now disputes, that the statutory limitation, "where it might have been brought," does not have reference to whether the plaintiff could reinstitute his action in the transferee forum at the time of transfer. This Court so held in *Hoffman* v. *Blaski*, 363 U.S. 335 at 342–343, adopting the view that the limitation focuses instead upon "'the situation which existed when suit was instituted.'" *Id.* at 343.

To be sure, there may be impediments to the plaintiffs' action going forward in the transferee forum at the time of transfer, which should be taken into account under Section 1404(a). For example, the proposed transferee forum might apply a principle of laches under which the transferred action would be barred there. Such a factor of state law, however, is to be considered in determining whether transfer would be "in the interest of justice," not whether the transferee district is a place where the action "might have been brought." The fact that the ability of the action to go forward in the transferee district after transfer does not determine whether it "might have been brought" there, was shown by *Hoffman* v. *Blaski*. There, even though the actions concededly could and would have gone forward in the transferee districts had transfer been permitted, the Court held those districts not to be places where the actions

"might have been brought" and therefore held transfer to be impermissible.

The nature of the limitation which the words "where it might have been brought" impose appears from the decisions of this Court in *Hoffman* v. *Blaski* and *Continental Grain Co.* v. *Barge FBL–585*, and from the statutory context of Section 1404(a). In the two cases decided *sub nom. Hoffman* v. *Blaski* the Court held that the statutory limitation prohibited transfer when the federal court to which transfer was proposed "lacked venue of the action and ability to command jurisdiction over the defendants" at the time where the suits were originally instituted. 363 U.S. at 337, 339. In *Continental Grain Co.* v. *Barge FBL–585*, 364 U.S. 19, the Court held, on the other hand, that the limitation did not prohibit transfer of an *in rem* action in admiralty to a district where the *res* was not located so long as, at the time the action was brought, the transferee district court had venue of an action *in personam* against the owner of the *res* and the ability to command jurisdiction over his person. In each case the question the Court deemed determinative was whether the transferee district had been designated *by federal law regulating the place of trial* as an appropriate place for suit to be brought, thus giving the plaintiff a right to bring it there under federal law when he instituted suit.

This interpretation of the words, "where it might have been brought," as referring to those places which federal provisions specify as appropriate places for trial is confirmed by examination of the venue provisions of the United States Code. In the venue chapter

of the Judicial Code (Ch. 87, §§ 1391–1406) Congress repeatedly provides where actions of various types "may be brought,"[20] "prosecuted,"[21] or "instituted"[22] (or occasionally where they "must"[23] or "shall be brought"[24]). That is, Congress has designated limited statutory venue where a given action "may be brought." Had Congress omitted the limitation, "where it might have been brought," from the transfer-of-venue statute, these statutory venue provisions might have been totally superseded by the transfer remedy, for it would have been open to a district judge, without regard to whether the transferee forum was a designated statutory venue, to transfer a case to any district if he reasonably deemed trial there to be in the interests of "convenience" and "justice". By imposing a limitation of transfer to districts "where it might have been brought," Congress, however, showed that it wished transfer to operate within its general statutory venue provisions. The words thus limit the choice of federal forums to which transfer may be made to those designated as statutory venues by federal law.

For example, where federal jurisdiction is founded only on diversity of citizenship, 28 U.S.C., 1391(a) provides that the action "may * * * be brought only in the judicial district where all plaintiffs or all de-

[20] 28 U.S.C., Sections 1391(a), 1391(b), 1392(a), 1392(b), 1393(b), 1395(d), 1396, 1397, 1399, 1400(b).

[21] 28 U.S.C., Sections 1394, 1395(a), 1395(b), 1395(c), 1395(e), 1401, 1402(a), 1402(b).

[22] 28 U.S.C., Section 1400(a).

[23] 28 U.S.C., Sections 1393(a).

[24] 28 U.S.C., Sections 1398, 1403.

fendants reside." Suppose that all defendants in an action reside both in Vermont and Connecticut, that all plaintiffs reside in California, and that the action is originally brought in California. Without the limitation, "where it might have been brought," in Section 1404(a), transfer, if deemed in the interests of convenience and justice by the district judge, might be effected to *any* federal district court anywhere. The district judge might transfer to a district court in Montana, Virginia, or any other federal district court, regardless of Section 1391(a). The purpose of the restriction, "where it might have been brought," was to limit the potential places of transfer to Vermont or Connecticut, which are the only places besides California where the action "may be brought" under Section 1391(a). The potential places of transfer are thus co-extensive with the places where federal law originally provided the action "may be brought"; Section 1404(a) permits the district judge to choose among those places, and only those places, on the basis of convenience and justice. Since it is conceded in this case that the District Court of Massachusetts is a place where, under the applicable federal statutes regulating venue and jurisdiction over the person, these actions "might have been brought," it is a place to which transfer may be made under Section 1404(a)

[11] See Korbel, *The Law of Federal Venue and Choice of the Most Convenient Forum*, 15 Rutgers L. Rev. 607, 611 (1961): "[I]n substituting transfer for dismissal, the legislators felt obliged to develop a method for delimiting the permissible transferee courts. The simplest solution was to resort to that same law of venue and process which already served to delimit the permissible transferor courts." See, also, 1 Moore, *Federal*

upon a finding that the interests of convenience and justice will thereby be satisfied."

On the other hand, the decision of the court of appeals would limit the federal forums to which transfer might be made not only by federal venue provisions, but by numerous provisions of state law having nothing to do with federal venue policy. In the present case there could be no transfer to Massachusetts because of Massachusetts rules governing the capacity of a personal representative to sue. Pre-

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Practice, ¶ 0.145[6.-1], at p. 1789; 1 Barron & Holtzoff, *Federal Practice and Procedure* (1962 Pocket Part), § 86.2.

It is not wholly clear from the decision in *Hoffman* v. *Blaski* whether transfer will be denied if the transferee district is a statutory venue but lacked jurisdiction over the defendant's person at the time suit was instituted. Some of the restrictions on personal jurisdiction might be deemed federal restrictions on the place of trial, making it a fair conclusion that the words "where it might have been brought" have reference to the jurisdiction as well as venue provisions of federal law. In *Hoffman* both venue and personal jurisdiction were missing: so the question was not necessarily resolved. A rule holding personal jurisdiction in the transferee forum at the time of the original suit, in addition to venue, to be necessary for transfer would cause some difficulty in administration. An important and traditional foundation of personal jurisdiction in the federal courts is personal service upon the defendant within the state where the court sits, regardless of his permanent residence. (See Rule 4(d)(1) and (f), F.R. Civ. Proc.) If personal jurisdiction in the transferee district at the time of original suit is relevant to transfer, that may entail difficult collateral investigations into the whereabouts of the defendant at the time of the original complaint. (See dissenting opinion of Mr. Justice Frankfurter in *Hoffman* v. *Blaski*). However, it is unnecessary to decide that issue here, since it is clear that in this case the transferee forum had personal jurisdiction over all defendants at the time of suit, as it is clear it was a designated federal venue at that time.

sumably, the same reasoning would completely bar transfer in a large number of cases brought by other types of fiduciaries who have not qualified to sue in the transferee districts. It would also prohibit transfer in numerous other situations, for example, where the applicable state law of the proposed transferee forum imposes a requirement that a bond be posted [11] or an appointment of an agent to receive process be made [12] as a condition of bringing suit. If plaintiff has not posted the bond or appointed the agent *at the time he originally brings suit* in another forum, transfer would forever become impossible under the court of appeals' decision here. This would be true even though the bond might well be posted or the agent appointed by the time of the transfer motion or, as in this case, the defendant might waive the requirement by that time, thus making posting or filing unnecessary under state law. The consequence would be that such state rules would bar transfer even though they would have absolutely no effect upon the case. There is no apparent reason why state law which does not reflect federal venue policy and which can have no substantive effect upon the litigation should thus govern the place of trial in the federal courts.

Hoffman v. *Blaski* does not remotely require this result. In that case requirements of state law played no part in the Court's decision. Transfer was prohibited in *Hoffman* because, under the applicable *federal provisions regulating the place of trial*, the

[11] See *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541.

[12] See *Woods* v. *Interstate Realty Co.*, 337 U.S. 535.

transferee districts were not places where the actions "might have been brought." They were not places where the applicable venue statutes in the Judicial Code provided such actions "may be brought," nor was there jurisdiction over the persons of the defendants under the applicable rules governing the *in personam* jurisdiction of the federal courts. On the other hand, *Continental Grain Co.* v. *Barge FBL-585, supra,* suggests a result directly contrary to what the court of appeals has here decided. In that case, the place of transfer was a place where an action might have been brought *in personam* against the owner of a barge under the applicable federal venue and personal jurisdiction provisions. It was urged, however, that since the action to be transferred was in part an action *in rem* in admiralty against the barge, transfer could not be made because the transferee district did not have power over the *res*. The Court held that since the issues in the *in rem* and *in personam* action would be the same, the fiction of an *in rem* action would not prevent transfer when "the practical economic fact of the matter" was that exactly the same relief could be obtained in the *in personam* action as in the *in rem* action. 364 U.S. at 26. The *in rem* fiction could not determine where the action "might have been brought." As the Court said, "To construe § 1404(a) this way merely carries out its design to protect litigants, witnesses and the public against unnecessary inconvenience and expense, not to provide a shelter for *in rem* admiralty proceedings in costly and inconvenient forums." 364 U.S. at 27. In the present case, Section 1404(a)

similarly should not provide a shelter for representative wrongful death proceedings in costly and inconvenient forums.

In summary, when Congress provided for transfer to districts where the action "might have been brought," it authorized transfer to districts where, under federal law, the action "may be brought," if the interests of convenience and justice so require. The limitation has nothing to do with whether trial can actually go forward under state law, but refers only to federal limitations upon the place of trial. If applicable state law provides a real impediment to the progress of the action in the transferee forum, transfer would offend the "interest of justice" and be inappropriate for that reason.[20] But state law with no substantive application to the case cannot absolutely frustrate the just transfer of a federal action to a place deemed appropriate for trial by federal law.[21]

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[20] Thus, under the logic of our argument, if Massachusetts absolutely prohibited a resident of another state from bringing a wrongful death action in a representative capacity, and if this were a "jurisdictional" matter which the Massachusetts court would raise on its own motion, the District Court of Massachusetts would nevertheless be a district where these actions "might have been brought," for it would remain a place which was designated by federal law as a place where the actions "may be brought." Presumably, however, unless some way could be found to bring the death action in Massachusetts in such a case (such as appointment of a Massachusetts resident as administrator for the purposes of the lawsuit) transfer should not be made as offending the interest of justice.

[21] We have found only one other decision in a lower court agreeing with the court of appeals in this case that plaintiff's failure to obtain representative capacity under the state law applicable in the transferee forum absolutely precluded transfer on the ground that the transferee forum was not a district "where it might have been brought." See *Felchlin* v. *American*

II

THE COURT OF APPEALS' DECISION CONFERS UPON PLAINTIFFS IN THIS CASE DISCRIMINATORY POWER TO SELECT THE FORUM, CONTRARY TO THIS COURT'S DECISION IN *HOFFMAN* V. *BLASKI*

Not only does the decision of the court of appeals make transfer here impossible because of an improper reference to state law, but its decision placed it solely within the power of the plaintiffs in the circumstances of this case to control the possibility of transfer. This result is contrary to this Court's admonition in *Hoffman* v. *Blaski*, 363 U.S. 335, 344, against "gross discrimination" in the application of Section 1404(a).

In *Hoffman* v. *Blaski*, the transferee districts were not ones designated by the applicable federal venue statutes as districts where the actions "may be brought," nor were they districts having unconsented jurisdiction over defendants' persons. The Court therefore prohibited transfer. The defendants, however, had argued that they were willing to waive their objections based upon lack of federal venue and personal jurisdiction in the transferee forum, so that

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Smelting & Refining Co., 136 F. Supp. 577 (S.D. Calif.). The *Felchlin* case was decided before this Court's decision in *Hoffman* v. *Blaski*. On the other hand, several lower court decisions have placed no reliance upon plaintiff's representative capacity or lack thereof in the transferee district in determining the propriety of transfer under Section 1404(a). *E.g.*, *Quinn* v. *Simonds Abrasive Co.*, 199 F. 2d 416 (C.A. 3), certiorari denied, 345 U.S. 964 (transfer denied); *Huff* v. *Nashville C. & St. L. Ry.*, 88 F. Supp. 735 (S.D. N.Y.) (transfer granted); *Leppard* v. *Jordan's Truck Line*, 111 F. Supp. 811, 816 (E.D. S.C.) (transfer granted).

transfer could be accomplished."[20] The Court rejected the effectiveness of the proffered waivers. Although the Court recognized that, as a general proposition, "venue, like jurisdiction over the person, may be waived" 363 U.S. at 343, it held that to give effect to such waivers for purposes of the transfer statute would be to confer upon defendants, as a class, discriminatory powers of forum selection, 363 U.S. at 344:

> The thesis urged by petitioners would not only do violence to the plain words of § 1404(a),

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[20] There may, on the surface, seem to be similarity between defendants' proferred waivers of venue and jurisdiction in *Hoffman* and defendants' waivers of their potential objections to plaintiffs' lack of Massachusetts capacity here. The court of appeals seems to have relied on the similarity (R. 75). In fact, however, the waivers are totally different in effect. Although, under federal venue practice, a defendant may "waive" his venue objection by not raising it if plaintiff brings suit in the wrong federal district (28 U.S.C. Section 1406(b)), that was not relevant in *Hoffman*, because plaintiffs there did not wish to bring suit in the transferee district, where defendants proferred their waiver. Venue provisions are meant to serve the interests of both the plaintiff and the defendant. If both agree upon an improper venue, the provisions do not prevent the action from going forward there. But in *Hoffman*, defendants sought through transfer to force plaintiffs into a venue where they did not consent to go forward with suit. Defendants' waivers could not thus deprive plaintiffs of their venue privilege. In this case, the Massachusetts rules regarding plaintiffs' capacity to sue cannot conceivably be thought to have been enacted for the benefit of plaintiffs, thus giving plaintiffs a privilege not to have suit go forward in the federal district court in Massachusetts. Therefore, acceptance of defendants' waivers of their potential capacity defense will not force plaintiffs into a federal forum where plaintiffs have any statutory privilege to prevent trial. On the contrary, the federal venue statutes designate Massachusetts as a proper place for trial of these actions.

but would also inject gross discrimination. That thesis, if adopted, would empower a District Court, upon a finding of convenience, to transfer an action to any district desired by the *defendants* and in which they were willing to waive their statutory defenses as to venue and jurisdiction over their persons, regardless of the fact that such transferee district was not one in which the action "might have been brought" by the plaintiff. Conversely, that thesis would not permit the court, upon motion of the *plaintiffs* and a like showing of convenience, to transfer the action to the same district, without the consent and waiver of venue and personal jurisdiction defenses by the defendants. Nothing in § 1404(a), or in its legislative history, suggests such a unilateral objective and we should not, under the guise of interpretation, ascribe to Congress any such discriminatory purpose.

Thus the Court held that Section 1404(a) must be read to preserve the relative powers of plaintiffs and defendants to determine the ultimate forum. A plaintiff's initial choice from among the forums designed by federal law may be overridden only when the defendant demonstrates that another of the designated forums is a more convenient and just place for trial. To allow the defendant to expand the available forums by consent would confer upon defendants a disparately great power in choosing the ultimate forum; it would "inject gross discrimination."

In this case, the court of appeals' decision would result in such discrimination, although here discriminatory powers of forum selection would be conferred upon plaintiffs rather than defendants. In *Hoffman*,

defendants were denied the power unilaterally to expand the number of available forums through discretionary waiver of the defenses of lack of venue and jurisdiction. But the decision below accords the representatives plaintiffs in these wrongful death actions a converse power unilaterally to contract the choice of available forums by simply refraining from qualifying in Massachusetts—a proper venue—when they wish to sue only in Pennsylvania. Section 1404(a) provides that the choice of venue upon a motion to transfer must be among venues where the action "might have been brought." From among these forums, the court is to choose the one best serving the interests of convenience and justice. Plaintiffs should not be able unilaterally to reduce these places "where it might have been brought" any more than defendants in *Hoffman* were held not to be able unilaterally to expand them. Federal law—neither the plaintiff nor defendant—determines whether a district is a place "where it might have been brought."

This power conferred on representative plaintiffs, in the circumstances of this case, by the decision below is, in fact, even more objectionable, under the *Hoffman* rationale, than the power denied defendants by the *Hoffman* decision. For even if defendants were allowed to expand the available forums by waiver of personal defenses, the exercise of that power would be tempered by the district court's ultimate discretionary power to deny improvident transfers as not according with "convenience" and "justice."[11] But the power

[11] See the dissenting opinion of Mr. Justice Frankfurter in *Sullivan* v. *Behimer*, 363 U.S. 335, 361–362.

enjoyed by the representative plaintiffs here to prevent transfer under the decision below is absolute and unchecked; once it is determined that the plaintiffs lacked representative qualification in the proposed transferee district at the time suit was instituted, the inquiry can go no further and the action is frozen in the forum chosen by the plaintiff, even though in this case it was quite likely that Massachusetts qualification could have been obtained.

If the decision below is allowed to stand, the beneficial purposes of the transfer statute will be therefore unavailable, at the discretion of plaintiffs, in all representatives death actions where plaintiffs have a choice whether or not to qualify in the proposed transferee district. Section 1404(a) should not thus be read to afford plaintiffs the power wholly to frustrate its purpose in this important type of litigation where transfer preeminently serves the interests of convenience and justice.

III

IN ADDITION, IT IS DOUBTFUL THAT A COURT OF APPEALS SHOULD RESORT TO ITS POWERS UNDER THE ALL WRITS ACT IN ORDER TO REVIEW A TRANSFER ORDER, WHEN THE COMPLAINING PARTY HAS FAILED TO PURSUE THE REMEDY PROVIDED BY THE INTERLOCUTORY APPEALS ACT

In our petition for a writ of certiorari, we reserved the right to argue that the court of appeals should not have reviewed the transfer order by way of mandamus and that respondents should have proceeded by seeking to invoke the Interlocutory Appeals Act, 28 U.S.C. 1292(b).[22] If this is so, it would not, of course,

[22] The text of the Act is as follows: "When a district judge, in making in a civil action an order not otherwise appealable

affect the jurisdiction of this Court to review the judgment of the court of appeals, which clearly had jurisdiction to consider an application for mandamus. It might, however, suggest that this Court should reverse the judgment below because an improper remedy was pursued, without reaching the merits of the district court's order of transfer. This difference in disposition of the case would be an important one from the standpoint of the significance of the Court's decision as a precedent.[*] We therefore set forth the reasons which, in our view, make it questionable whether mandamus is available in the situation posed by the case at bar.

This Court seems never to have explicitly approved the mandamus power of the courts of appeals as an appropriate means to review orders of transfer under Section 1404(a). In the two cases decided *sub nom. Hoffman* v. *Blaski*, the court of appeals, to be sure, had invoked the mandamus power in order to review

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under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order: *Provided, however*, That application for an appeal hereunder shall not stay proceedings in the district court unless the district judge or the Court of Appeals or a judge thereof shall so order."

[*] In addition, a decision on the merits of the district court's order would also foreclose the possibility of attack upon the transfer order after entry of final judgment in the cause, whereas a holding that the transfer order was not reviewable at an interlocutory stage would not necessarily preclude such an attack.

transfer orders. The parties did not press the issue in this Court, however, and the Court did not discuss it. See 363 U.S. at 340. Moreover, in both of these cases the mandamus petitions were filed before passage of the Interlocutory Appeals Act.[24] In *Continental Grain Co.* v. *Barge FBL-585*, the party objecting to transfer had invoked the Interlocutory Appeals Act, and the appeal was certified by the district judge and accepted by the court of appeals pursuant to that Act. Again the Court did not discuss whether that was the appropriate means of seeking review.

One case decided by the Court in the past strongly suggests that mandamus is not an appropriate remedy, even without considering the availability of the Interlocutory Appeals Act. In *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379, decided before passage of the Interlocutory Appeals Act, the Court decided that, in the circumstances of that case, mandamus was not an appropriate remedy to vacate a transfer order entered by a district judge under 28 U.S.C. 1406(a), another transfer provision of the Judicial Code. Section 1406(a) provides that when venue is laid in the wrong federal district, the district court shall dismiss, "or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought." Venue had been laid in the *Holland* case in the Southern District of Florida. Finding that district to be an improper venue, the district court

[24] The Act was effective on September 2, 1958. In one of the cases the petition for mandamus was filed prior to July 1, 1958. See 260 F. 2d 317 (C.A. 7). In the other case, the petition was filed on June 12, 1958. Transcript of Record, Supreme Court of the United States, October Term, 1959, No. 26.

ordered transfer under Section 1406(a) to the Northern District of Georgia. The plaintiff claimed that the district court had no "power" so to transfer because the defendant could be "found" in Florida and had "agents" there within the meaning of the applicable venue statute, and thus Florida was in fact a proper venue. Plaintiff therefore contended that Section 1406(a) did not apply and that his only immediate remedy for the improper transfer was mandamus. In holding mandamus improper, the Court first held that the district court's decision "even if erroneous * * * involved no abuse of judicial power." The Court assumed that the district court's decision that venue in Florida was improper "is reviewable upon appeal after final judgment" in Georgia. 346 U.S. at 381, 382. It then held the order of transfer to be an interlocutory order which was not subject to immediate review by way of mandamus, stating (346 U.S. at 383):

> In strictly circumscribing piecemeal appeal, Congress must have realized that in the course of judicial decision some interlocutory orders might be erroneous. The supplementary review power conferred on the courts by Congress in the All Writs Act is meant to be used only in the exceptional case where there is clear abuse of discretion or "usurpation of judicial power" of the sort held to justify the writ in *De Beers Consolidated Mines* v. *United States*, 325 U.S. 212, 217 (1945). This is not such a case.

If *Bankers Life & Casualty Co.* v. *Holland* applies to the present case, the court of appeals should not have issued the writ, and the district court's transfer

order must be reinstated for that reason. We turn therefore to a consideration of the question whether there are sound reasons for distinguishing *Holland*.

(1) A vital prop of the *Holland* case seems to have been the Court's assumption that the transfer order, if erroneous, was "reviewable upon appeal after final judgment." If the order of transfer had not been ultimately reviewable, the Court might have found mandamus an appropriate remedy in the circumstances, for otherwise a transfer order erroneous under Section 1406(a) would never be subject to appellate judicial review. Cf. *Leedom* v. *Kyne*, 358 U.S. 184.

In the present case, it is not clear that there would in fact be effective appellate review after final judgment of the validity of the district court's order under Section 1404(a), should review by way of mandamus now be denied. Should plaintiffs go to trial in the District of Massachusetts and lose there on the merits, it is quite possible that the transfer of the action from the District of Pennsylvania, even if technically erroneous, would amount at most to harmless error and thus not be cause for reversal. That, however, seems also to have been the situation in the *Holland* case, where there was no reason to suppose that trial in Georgia rather than Florida would have accounted for prejudicial error. The decision there may thus mean that transfer orders are reviewable only after final judgment and only if they ultimately result in harmful error affecting the final judgment (for example, if plaintiffs are unable to have a vital witness present in the transferee district, or if that district applies a rule of law affecting the outcome of the case,

which would not have been applied in the place where the suit originated). If so, this case would be reviewable only on the same terms.

(2) The theory of *Holland* may have been that the validity of transfer orders under Section 1406(a) is *always* reviewable after final judgment, regardless of whether the error in transfer is prejudicial, making mandamus unnecessary to insure ultimate review. The court of appeals case cited by the Court in *Holland* as authority for the proposition that review would take place after final judgment seems in fact to have held that there would be ultimate review regardless of prejudice. *Gulf Research & Development Co. v. Leahy,* 193 F. 2d 302, 304 (C.A. 3). There, the Third Circuit said that "if the order of transfer was erroneous all subsequent proceedings in the Delaware District Court are subject to that initial infirmity."

If an erroneous transfer order under Section 1406(a) is reviewable after final judgment regardless of prejudice, there is no reason to suppose that an erroneous order under Section 1404(a) does not similarly invalidate all subsequent proceedings—at least when the error, as in this case, is an error of law, and not merely an error in the exercise of discretion to decide whether transfer would serve the interests of convenience and justice. If mandamus was inappropriate in *Holland* because ultimate review was available, it would also be inappropriate here.

(3) The court of appeals in this case seems to have justified its use of mandamus because "the district court acted *without jurisdiction* in granting a motion to transfer under § 1404(a)" (R. 73; emphasis added). Even if mandamus is appropriate when the

district court exceeds its "jurisdiction," a holding that an erroneous transfer is such a jurisdictional error seems squarely contrary to the Court's holding in the *Holland* case. There, as here, it was asserted that the statute did not authorize the district court's transfer order, and that the district court therefore exceeded its "jurisdiction." In holding mandamus inappropriate, the Court said, 346 U.S. at 382:

> The contention is that in acting on the motion and ordering transfer he [the district judge] exceeded his legal powers and this error ousted him of jurisdiction. But jurisdiction need not run the gauntlet of reversible errors. The ruling on a question of law decisive of the issue presented by Cravey's [the defendant's] motion [to transfer] and the replication of the petitioner was made in the course of the exercise of the court's jurisdiction to decide issues properly brought before it [Citation omitted]. Its decision against petitioner, even if erroneous—which we do not pass upon—involved no abuse of judicial power * * *.

An error of law under Section 1404(a) seems no more a jurisdictional error than an error of law under Section 1406(a).

(4) The attack upon the district court's ruling in the *Holland* case seems to have been treated by this Court as "frivolous." (346 U.S. at 384; and see the dissenting opinion of Mr. Justice Frankfurter, 346 U.S. at 385). Although the Court did not directly rely upon the frivolity of the attack in holding mandamus inappropriate, it is conceivable that the result might have been different if a more serious legal

issue had been presented. Arguably, the supervisory power of the court of appeals would appropriately be called into play through mandamus in such a case to enable it to clarify the meaning of the statute for the guidance of other lower courts. Compare *Ex Parte Collett*, 337 U.S. 55, 72; *Kilpatrick* v. *Texas & Pacific R. Co.*, 337 U.S. 75; *United States* v. *National City Lines, Inc.*, 337 U.S. 78. The district court's ruling in this case is obviously not frivolous, and it might be deemed of sufficient general importance to justify a use of discretionary power.

(5) There has been a theory that mandamus is appropriate in transfer cases where a district court orders transfer to a district in another circuit, for such action "tends to frustrate or impede the ultimate exercise by the Court of Appeals of its appellate jurisdiction granted in some other provision of the law." See Mr. Justice Brennan's dissenting opinion in *La Buy* v. *Howes Leather Co.*, 352 U.S. 249, 264–266, referring to Chief Judge Magruder's comprehensive opinion in *In Re Josephson*, 218 F. 2d 174 (C.A. 1). This theory might be used to explain the holding in *Holland*, for there transfer was ordered from Florida to Georgia, districts both within the same circuit. The Court in *Holland* did not suggest, however, that the result turned upon the fact that transfer had been ordered to a place within the same circuit—a point not mentioned in the Court's opinion. Moreover, it would seem incongruous, especially in the presence of nationally applicable legislation governing interlocutory appeals, to make transfer orders reviewable or not solely depending upon whether they result in

transfer between two circuits, rather than in transfer wholly within one circuit, when such a factor has no other effect upon the course of the litigation.

In summary, the decision of the court of appeals to act by way of mandamus in this case was doubtful, even without consideration of the availability of the Interlocutory Appeals Act. Mandamus is probably not generally applicable to correct alleged errors—even errors of law—resulting in transfer under Section 1404(a), but the precedents do not exclude the possibility that it may be available in exceptional instances. Allowing for that possibility, we still suggest that, at least in the first instance, the complaining party should now be required to seek appellate review under the Interlocutory Appeals Act, a statute designed to afford review of interlocutory orders in exceptional circumstances and one which appears plainly applicable to interlocutory transfer orders, at least when the disputed issue is one of law. At least five decisions in at least three different courts of appeals have found the Act to be applicable to review transfer orders,[35] and the Report of the House Committee on the Judiciary on the Interlocutory Appeals Act lists transfer orders as one of the categories of orders appealable under the Act.[36] The use of the

[35] *Continental Grain Co.* v. *Barge FBL–585*, 268 F. 2d 240 (C.A. 5); *Ex Parte Deepwater Exploration Co.*, 260 F. 2d 546, 547 (C.A. 5); *Allstate Ins. Co.* v. *United States District Court*, 264 F. 2d 38 (C.A. 6); *Panhandle Eastern Pipe Line Co.* v. *Thornton*, 267 F. 2d 459 (C.A. 6); *Goldlawr, Inc.* v. *Heiman*, 288 F. 2d 579 (C.A. 2).

[36] H. Rep. No. 1667, 85th Cong., 2d Sess., pp. 1–2. See also Hearings on H.R. 6238 before Subcommittee No. 3 of the House

Act as the primary remedy to review orders of transfer will prevent litigants objecting to transfer from automatically invoking the court of appeals' consideration, thus causing delay in the progress of the litigation. Transfer orders are made in the interest of the just expedition of litigation and, in general, they ought to become effective without opportunity to request immediate appellate review. Use of the Interlocutory Appeals Act as the remedy for allegedly erroneous transfer orders would also appropriately preserve the quality of mandamus as an extraordinary writ, whereas its use as the ordinary means to review all transfer orders under Section 1404(a) will soon destroy the extraordinary character of the writ.

We would conclude, therefore, that the court of appeals should not have invoked its mandamus power in this case. The plaintiffs' remedy lay under the Interlocutory Appeals Act, and mandamus was appropriate, if at all, only upon an abuse of discretion in the application of that Act. However, we recognize that this Court has not previously held that the Act is the proper way in which to seek review of transfer orders, and, in *Hoffman* v. *Blaski*, the Court did review court of appeals' decisions in transfer cases made through exercise of the mandamus power. Moreover, even if the Court should adopt the view which we urge—that the complaining party should seek review of transfer orders under the Interlocu-

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Committee on the Judiciary, 85th Cong., 2d Sess., pp. 8–9 (Testimony of Chief Judge Parker); *Deepwater Exploration Co.* v. *Andrew Weir Ins. Co.*, 167 F. Supp. 185, 187–188 (E.D. La.).

tory Appeals Act—the Court might still conclude that a misuse of the mandamus power is not equivalent to a fundamental lack of jurisdiction in a court of appeals and that it would therefore be appropriate to consider in this instance the merits of the district court's order.

In short, while we do not contend that the Court is required by jurisdictional considerations to set aside the writ of mandamus issued below and do not seek to foreclose consideration of the underlying issues involving the proper interpretation of Section 1404 (a), we have concluded that we should invite attention to the significant procedural issue involved. We also suggest that it would be appropriate for the Court to indicate that mandamus is no longer to be considered the primary or ordinary avenue for seeking review of transfer orders.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the decision below should be reversed and the district court's order of transfer reinstated.

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AUGUST 1963.

U.S. GOVERNMENT PRINTING OFFICE: 1963

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SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
OCT 10 1963
JOHN F. DAVIS, CLERK

IN THE

Supreme Court of the United States

Nos. 56 and 80 OCTOBER TERM, 1963

Francis L. Van Dusen, United States District Judge, et al.,
Petitioners

v.

Roberta Barrack, Administratrix, et al.,
Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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PRESS OF ALLEN, LANE & SCOTT, PHILADELPHIA

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IN THE

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NOS. 56 AND 80

Francis L. Van Dusen, United States District Judge, et al.,

Petitioners

v.

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Respondents

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

OPINIONS BELOW

The opinion of the district court appears at 204 F. Supp. 426 and at pages 1-20 of the Record.

The opinion of the court of appeals, as amended, appears at 309 F.2d 953 and at pages 71-77 and 95-96 of the Record.

JURISDICTION

Petitioners invoke the jurisdiction of this Court under the provisions of 28 U.S.C. § 1254(1).

QUESTIONS PRESENTED

1. May a district court order a civil action transferred to a district in which plaintiff fiduciary lacks capacity to sue?

Answered in the negative by the court of appeals.

2. May a district court, in an effort to facilitate the disposition of numerous cases arising from a single airplane disaster, order a group of civil cases transferred to another district at great expense, inconvenience and delay to plaintiffs and to the grave prejudice of their substantive rights under the law of damages?

Not answered by the court of appeals.

STATUTE AND RULE INVOLVED

Section 1404(a) of the Judicial Code, 28 U.S.C. § 1404(a), provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

Rule 17(b) of the Federal Rules of Civil Procedure, provides, in pertinent part:

> "CAPACITY TO SUE OR BE SUED. The capacity of an individual, other than one acting in a representative capacity, to sue or be sued shall be determined by the law of his domicile. . . . In all other cases, capacity to sue or be sued shall be determined by the law of the state in which the district court is held. . . ."

STATEMENT OF THE CASE

I. The identity of the parties.

Petitioners are:

(a) Various domestic corporations and the United States, all of whom are defendants in certain actions for wrongful death brought by Respondents in the Eastern District of Pennsylvania (R. 72) (these Petitioners are hereinafter referred to as "defendants"); and

(b) The Honorable Francis L. Van Dusen, Judge of the United States District Court for the Eastern District of Pennsylvania, who ordered those actions for wrongful death transferred from that district to the District of Massachusetts (R. 72).

Respondents are:

The 30 executors or administrators representing the estates of 23 decedents,[1] who brought these 37 actions against the corporate and governmental defendants (Respondents are hereinafter referred to as "plaintiffs").

II. The decision of the court of appeals now before this Court for review.

Defendants have asked this Court to review a decision of the Court of Appeals for the Third Circuit

[1] The actions subject to the order of the court of appeals are identified in Exhibit "B" to that order (R. 84-92). Although corporate defendants in their Brief in No. 56, p. 3, refer to five personal injury actions as well, the order of the court of appeals which is the subject of the instant certiorari was directed only to the wrongful death actions (R. 77, 80-92).

which held that a writ of mandamus should issue directing the district court to vacate its order transferring these wrongful death actions to the District of Massachusetts. The court of appeals so held for the reason that the death actions could not have been brought in the District of Massachusetts (R. 71-77).

This Court, by orders dated April 15, 1963, granted defendants' petitions for certiorari (R. 97-98).

III. The facts of record upon which the court of appeals rendered its decision.

Twenty-six of the 30 representative plaintiffs are citizens of Pennsylvania and residents of the Eastern District of said state (R. 23, 32-33, 36, 41).[2]

Each of the decedents whose estates are represented by the fiduciary plaintiffs died on October 4, 1960, in an airplane crash in Boston Harbor, Massachusetts (R. 1-2).

Twenty-two of the decedents died residents of Pennsylvania with their assets located in Pennsylvania (R. 23, 33, 36-37).[3]

Twenty-nine of the 30 plaintiffs are fiduciaries duly appointed by a Register of Wills of Pennsylvania

---

[2] Plaintiff Doris A. Laister was a citizen and resident of Pennsylvania at the time of commencing her action but has since moved to Florida (R. 41). Plaintiffs Long and Manney in the *Reitz* case are residents of the Middle District of Pennsylvania, and plaintiff Braff is a resident of Camden County, New Jersey (R. 29).

[3] Plaintiff Braff's decedent died a resident of Camden County, New Jersey (R. 29).

(R. 23, 34, 36)[4], and 25 have never been appointed or licensed as fiduciaries by any officers or agency of Massachusetts.[5] The same 25 have not filed any action with respect to their respective decedents in any court other than the United States District Court for the Eastern District of Pennsylvania.

Nevertheless, defendants moved to transfer each of these actions to the District of Massachusetts.

Those motions were granted by the United States District Court for the Eastern District of Pennsylvania and an order of transfer was entered (R. 21-22).

The court of appeals subsequently directed the district court to vacate that order (R. 79-81).

IV. The respective positions of the parties before this Court.

Defendants claim that:

The decision of the court of appeals setting aside the order of transfer was erroneous and should be reversed because:

---

[4] Plaintiff Braff was appointed administratrix ad prosequendum and general administratrix by the Surrogate's Court of Camden County, New Jersey.

[5] Three of the exceptions involving five plaintiffs are stated in corporate Petitioners' Brief in No. 56, p. 8. In addition, plaintiffs in the *Braff* and *Reits* cases brought separate actions against the United States in the Eastern District of Pennsylvania, but those actions were ordered transferred to the District of Massachusetts pursuant to 28 U.S.C. § 1406(a) for lack of proper venue (R. 77, 95-96). During the period that the instant cases were pending before the court of appeals, plaintiffs Braff, Long, and Manney applied for and obtained appointment as fiduciaries in Massachusetts.

(a) such transfer is not contrary to the provisions of 28 U.S.C. § 1404(a);

(b) such transfer is required in the interests of efficient administration of the courts in airplane disaster cases; and

(c) the issuance of a writ of mandamus by the court of appeals was improper in that this extraordinary writ was not available to plaintiffs.

Plaintiffs claim that:

To the contrary, the decision of the court of appeals setting aside the order of transfer is correct and should be affirmed because:

(a) such transfer is precluded by the letter and intent of 28 U.S.C. § 1404(a) and Rule 17(b) of the Federal Rules of Civil Procedure, as construed by prior decisions of this and other courts; and

(b) such transfer would delay and complicate rather than expedite the disposition of airplane disaster cases, and would be contrary to the interests of justice in that, at great expense, inconvenience and delay to plaintiffs, it would unreasonably impair their right to select the forum, and greatly prejudice their substantive rights under the law of damages; and

(c) the issuance of a writ of mandamus by the court of appeals was proper inasmuch as the district court did not certify any controlling question of law pursuant to the provisions of the Interlocutory Appeals Act, 28 U.S.C. § 1292(b), and the transfer constituted a misuse of judicial power.

SUMMARY OF ARGUMENT

The district court lacked power under 28 U.S.C. § 1404(a) to transfer these actions to the District of Massachusetts because that district was not one where they "might have been brought." All but one of plaintiffs are Pennsylvania fiduciaries representing the estates of Pennsylvania decedents. The great majority of plaintiffs, having never qualified as fiduciaries in Massachusetts, are barred by the terms of Fed. R. Civ. P. 17(b) from bringing suit in the district court of that state, since the federal rule incorporates state law governing capacity to sue of personal representatives.

I. In Massachusetts, plaintiffs' lack of capacity would be an absolute defense to their actions. This lack of capacity is substantial and not merely technical, since qualification in that state as a fiduciary entitled to bring a tort action requires a separate proceeding in a different court involving several steps. The probate court exercises discretion in determining the suitability of proposed fiduciaries and has sometimes rejected ostensibly qualified persons for various reasons. Plaintiffs who are corporate fiduciaries would be subject to more onerous and perhaps prohibitive qualification procedures involving both the courts and regulatory bodies. Even if plaintiffs could now qualify, their capacity at the time of filing their complaints determines whether these actions "might have been brought" in Massachusetts within the meaning of

§ 1404(a) as construed in *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

II. Plaintiffs' incapacity to bring these actions in Massachusetts cannot be cured by the attempted waiver of defendants. The § 1404(a) provision limiting transfer to districts where the action "might have been brought" includes the federal incorporation of state policies in Rule 17(b), which adopts state law governing capacity, as well as the bars of lack of venue and jurisdiction over the person. Courts deciding similar transfer motions involving a plaintiff's lack of fiduciary capacity in the proposed transferee forum have so held. *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 57 (S.D. Calif. 1955). *Goranson* v. *Capital Airlines, Inc.*, U.S.D.C.E.D. Va., Richmond Div., C.A. No. 3545, April 10, 1963. The importance of the state policy given effect by Rule 17(b) is shown by the large number of states with capacity statutes similar to that of Massachusetts.

III. Transfer of these actions imposes substantial burdens on plaintiffs. Defendants argue that transfer would result in "efficient" and "expedited" disposition of disaster cases but produced no evidence whatever to support their contention. The experience of trial courts supports the inference that consolidation of these 37 actions with 114 others in Massachusetts will result in complicated and cumbersome discovery and trial, prolonging the litigation far beyond the expectable time for the determination of these 37

actions were plaintiffs permitted to proceed independently. Most importantly, transfer from a forum in a state with a strong constitutional and decisional policy in favor of compensatory tort damages to a forum in a state with an almost unique policy of limited and penal damages cannot be in the "interest of justice" since such transfer gravely jeopardizes plaintiffs' rights to adequate compensation for their losses and raises intricate and unsolved problems of choice of laws.

Transfer would also deprive plaintiffs of their right to have the crucial conflict of laws issue decided by a court sitting in Pennsylvania and intimately familiar with the history, policy, and provisions of Pennsylvania law rather than by a court sitting in Massachusetts, regularly deciding death actions under Massachusetts law and necessarily influenced by the contrary history and policy of that law.

IV. Mandamus has been repeatedly recognized as the proper remedy when the district court ordering transfer exceeds its power but does not certify the question as appealable in any order or opinion.

ARGUMENT

I. These 37 representative actions could not have been brought in Massachusetts.

In its decision below, the court of appeals fully accepted the argument that these death actions could not have been brought in Massachusetts. *Barrack*

Van Dusen, 309 F.2d 953, 956-958 (3d Cir. 1962) (R. 74-77). The Government candidly concedes that defendants would have had the defense of plaintiffs' lack of capacity in Massachusetts, Brief in No. 80, p. 10, although it attempts to minimize the significance of this concession.

However, the corporate defendants both dispute plaintiffs' lack of capacity and attempt to minimize its importance. It is therefore appropriate to review the relevant law of Massachusetts in light of Section 1404(a), *Hoffman* v. *Blaski,* and Rule 17(b).

The relevant transfer statute, 28 U.S.C. § 1404(a), provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought."

This court held in *Hoffman* v. *Blaski,* 363 U.S. 335 (1960), that the phrase "where it might have been brought" can not be interpreted to mean "'where it may now be rebrought, with defendants' consent.'" 363 U.S. at 342-43.

Rule 17(b) of the Federal Rules of Civil Procedure provides that, other than in cases of individuals suing on their own behalf, and with certain other exceptions not material here:

> "... capacity to sue or be sued shall be determined by the law of the state in which the district court is held. ..."

Plaintiffs are individuals and corporations suing in their representative capacities.

Under the law of Massachusetts, if an administrator or executor appointed in another state brings suit in Massachusetts without first qualifying in Massachusetts and the defendant makes a timely motion to dismiss, the motion must be granted. *Boutillier* v. *Wesinger*, 322 Mass. 495, 78 N.E.2d 195 (1948), citing *Brown* v. *Boston & M. R.R.*, 283 Mass. 192, 186 N.E. 59 (1933).

In the *Boutillier* case, a death action was brought in Massachusetts by a New Hampshire administratrix who had been appointed by a New Hampshire probate court. The defendant failed to make a timely motion to dismiss, but in reviewing the applicable Massachusetts law Chief Justice Qua, speaking for a unanimous Supreme Judicial Court of Massachusetts, said:

> "It is settled in this Commonwealth that an administrator appointed in another jurisdiction is not thereby qualified to maintain an action here under our death statute." 322 Mass. at 496, 78 N.E.2d at 196.

That rule of law is amplified by the Massachusetts statute which provides that if the complaint alleges that a party is duly qualified to bring the action in a representative capacity, that allegation shall be taken as admitted *unless* it is controverted in the specified manner within the specified time. Mass. Ann. Laws, ch. 231, § 30 (1956).

Thus, a defendant in Massachusetts may as a matter of right terminate an action brought by an out-of-state fiduciary by controverting the plaintiff's allegation of capacity to sue.

Corporate defendants therefore do not contend that plaintiffs' 37 representative actions actually could have been brought in Massachusetts. Instead they argue that even though plaintiffs lacked the requisite capacity to bring an action in Massachusetts, they probably could have obtained the necessary qualification if they had tried to do so.

But in order to obtain ancillary appointment in Massachusetts it would have been necessary for these individual plaintiffs to institute in the Massachusetts Probate Court a separate and distinct proceeding, the outcome of which would have been doubtful at best. Moreover, in some of these cases the separate proceeding could not have been completed prior to the expiration of the statutory period of one year within which these representative actions were required to be brought.

Section 1 of Chapter 193 of the Annotated Laws of Massachusetts (1955), which applies to non-resident intestates, among others, provides:

> "§ 1. *Administration, to Whom Granted.* Administration of the estate of a person deceased intestate shall be granted to one or more of the persons hereinafter mentioned and in the order named, if competent and suitable for the discharge of the trust and willing to undertake it,

unless the court deems it proper to appoint some other person:

"First, The widow or surviving husband of the deceased.

"Second, The next of kin or their guardians or conservators as the court shall determine.

"Third, If none of the above are competent or if they all renounce the administration or without sufficient cause neglect for thirty days after the death of the intestate to take administration of his estate, one or more of the principal creditors, after public notice upon the petition.

"Fourth, If there is no widow, husband or next of kin within the commonwealth, a public administrator."

With respect to the identity of the person appointed, the priorities set forth in the statute are normally respected, Newhall, *Settlement of Estates and Fiduciary Law in Massachusetts*, § 47 (4th ed. 1958), but they are subject to the judgment of the Probate Court as to the suitability of the applicant.

Of the instant plaintiffs representing intestate estates, only the decedents' widows are within the priorities set forth in the statute. Not all plaintiffs so qualify. For instance, administrator Rapp of the Zeller estate is neither the surviving spouse, next of kin or their guardian, nor a creditor.

The requirement that the applicant be adjudged suitable by the court is clarified by a number of authorities. In *Morgan v. Morgan*, 267 Mass. 388,

166 N.E. 747 (1929), the Supreme Judicial Court upheld the refusal of a Probate Court to appoint an intestate's widow as administratrix. In so doing, the court considered the meaning of the statutory phrase "unless the court deems it proper to appoint some other person," and held that:

> "The apparent purpose of this amendment [to the statute] was to give the Probate Court a new discretionary power to consider the competency and suitableness of the petitioning party for the discharge of the trust. Upon the record presented to this court the decree dismissing the petition of Mrs. Morgan cannot be said to be wrong as [a] matter of law." 267 Mass. at 393, 166 N.E. at 748.

Again, in *Davis, Petitioner,* 237 Mass. 47, 129 N.E. 366 (1921), the Supreme Judicial Court defined "suitable persons", as used in the statute providing for the appointment of administrators, as follows:

> ". . . The words 'suitable persons' have no statutory or other fixed and inflexible meaning in this connection. Their context in connection with the history of the statute shows that they were intended to confer a wide discretion upon the Probate Court. They authorize the appointment of the person or persons who appear in the exercise of sound and discerning judgment in the light of all the circumstances of the particular case to be best equipped by temperament, experience and sagacity to discharge the trust with fidelity, prudence and promptness. The appointee should be a fitting person having regard to the

> special conditions of each estate and those interested in it as creditors, legatees, and next of kin. Suitableness is capacity founded on the innate and acquired qualities of the particular person in his relation to the situation of the estate to be administered, and to those directly and indirectly to be affected by the settlement of the estate. Attention may be given to personal characteristics and to all the other causes, not easily susceptible of enumeration, rationally affecting a judicious selection." 237 Mass. at 49-50, 129 N.E. at 366-67.

Other cases to the same effect are *Black* v. *Dobbins,* 325 Mass. 587, 91 N.E.2d 782 (1950); *Gordon* v. *Shea,* 300 Mass. 95, 14 N.E.2d 105 (1938); see Newhall, *Settlement of Estates and Fiduciary Law in Massachusetts* § 47, pp. 172-3 (4th ed. 1958). In *Black* v. *Dobbins,* the Probate Court declined to appoint as administrator "a reputable member of the bar of this Commonwealth" nominated by the next of kin and appointed instead another member of the bar nominated by other heirs. 325 Mass. at 589, 91 N.E.2d at 783.

Where a non-resident dies testate, as for example in the case of plaintiff Scott's decedent, the procedure for the appointment of an ancillary administrator in Massachusetts is also regulated by statute. Mass. Ann. Laws, ch. 192, §§ 4, 9, 10 (1955). Those provisions require a judicial hearing after newspaper publication and a finding by the court as to the propriety of the contemplated appointment.

In this situation as well there is no obligation that the Probate Court appoint as representative in Massachusetts the executor or executors named in the will. There are numerous cases in which the Probate Court has refused to do so. *E.g., Osborne* v. *Craig*, 251 Mass. 169, 146 N.E. 263 (1925); *Martin* v. *Otis*, 233 Mass. 491, 124 N.E. 294 (1919); *Cogswell* v. *Hall*, 183 Mass. 575, 67 N.E. 638 (1903).

Here, in the *Scott* case, plaintiff administrator was appointed to succeed a previous administrator who in turn was appointed upon the named executor's refusal to serve. It is therefore well open to question whom the Probate Court of Massachusetts might choose to appoint.

In the case of a non-resident ancillary administrator, there is a further statutory requirement in Massachusetts that a resident be appointed agent for service of process before the former can enter upon his duties. Mass. Ann. Laws, ch. 195, § 8 (1955). Such an administrator must also post a suitable bond. Mass. Ann. Laws, ch. 205, § 1 (1955).

The corporate fiduciaries involved in these actions would be able to qualify as fiduciaries in Massachusetts only because Pennsylvania grants reciprocal privileges to Massachusetts corporate fiduciaries. Mass. Ann. Laws, ch. 167, § 45A (Supp. 1962). To achieve such qualification, each corporate fiduciary would be required first to submit itself to the regulatory and taxing jurisdiction of Massachusetts by making application to the board of bank incorporation for a certifi-

cate authorizing it to transact business in Massachusetts. Mass. Ann. Laws, ch. 167 § 37 (1959); ch. 167 § 45A (Supp. 1962). Without such authority to transact business, a foreign corporation may not act in a fiduciary capacity in Massachusetts. *Re Guaranty Trust Co.*, 248 Mass. 319, 143 N.E. 46 (1924).

In summary, therefore, in order for an ancillary administration to be achieved in Massachusetts, it is necessary that there be a formal judicial proceeding prior to and separate from any other litigation, that certain substantive requirements be met, and that the court give its approval to the applicant. As noted, there are numerous instances in which the court has not given such approval.

Neither Section 1404(a) nor any decision of this Court suggests that the phrase "might have been brought" is intended to include actions which might have been brought only after the successful conclusion of entirely separate legal proceedings uncertain as to outcome.

Still further, defendants' arguments do not take into account another aspect of these cases which bars transfer.

All of plaintiffs' decedents died on the date of the crash, October 4, 1960 (R. 1-2).

The Massachusetts wrongful death statute, Mass. Ann. Laws, ch. 229, § 2 (Supp. 1962), provides:

> "An action to recover damages under this section shall be commenced within one year from the date of death . . ."

Thus, under the statute, a personal representative must bring his action within one year from the date of death of his decedent. This requirement is an integral part of the statute creating that right of action rather than a statute of limitations. Mass. Ann. Laws, ch. 229, § 2 (1962 Supp.); *Bickford* v. *Furber*, 271 Mass. 94, 170 N.E. 796 (1930); *Crosby* v. *Boston Elevated Ry.*, 238 Mass. 564, 131 N.E. 206 (1921).

As set forth above, each of the plaintiff fiduciaries would have had to petition the Probate Court for a license to commence these actions. In the case of a testamentary estate, publication of such application must be given commencing at least thirty days before the hearing. Mass. Ann. Laws, ch. 192, §§ 4, 9, 10 (1955). In the case of an intestacy, fourteen days' notice of the filing of the petition for appointment is required. Mass. Ann. Laws, ch. 204, § 3 (1955).

These time factors are significant because at least two of the instant actions, *Frankenfield* (an intestate estate) and *Scott* (a testate estate), were commenced in the lower court less than fourteen days before the expiration of one year from the date of death (R. 34-35) and plaintiff Scott was not appointed a fiduciary in Pennsylvania until October 2, 1961, one day before the expiration of his right to commence an action for wrongful death.

Thus, apart from all other obstacles to qualification in Massachusetts, time alone made it impossible for some of these plaintiffs to have qualified in Massachusetts before the last day upon which the suits could have been commenced.

All of the foregoing considerations aside, however, this Court has specifically held in *Hoffman v. Blaski*, 363 U.S. 335, 342 (1960), that the phrase "where it might have been brought" relates only to the time of the bringing of the action and whatever might have been done before the action was commenced or whatever might have been done after the action was commenced can not increase the number of forums "where it might have been brought."

The Government in its brief concedes this to be the case, saying, "We agree that, as the court of appeals held, the words, 'where it might have been brought', have reference to a situation 'at the time [plaintiff] filed its original complaint.'" Brief for Petitioners in No. 80, p. 12. In this the Government is of course correct.

In *Hoffman* v. *Blaski*, 363 U.S. 335, 342 (1960), the appellants contended that the phrase "where it might have been brought" should be held to relate not only to the time of bringing the action but also to the time of transfer.

But this Court then flatly rejected that contention:

> "We do not agree. We do not think the § 1404(a) phrase 'where it might have been brought' can be interpreted to mean . . . 'where it may now be rebrought, with defendants' consent.' This Court has said in a different context, that § 1404(a) is 'unambiguous, direct [and] clear,' *Ex parte Collett*, 337 U.S., at 58, and that

'the unequivocal words of § 1404(a) and the legislative history . . . [establish] that Congress indeed meant what it said.' . . . we think the dissenting opinion of Judges Hastie and McLaughlin in *Paramount Pictures, Inc.* v. *Rodney*, 186 F.2d 111 (C.A. 3d Cir.), correctly answered this contention:

"'But we do not see how the conduct of a defendant after suit has been instituted can add to the forums where 'it might have been brought.' In the normal meaning of words this language of Section 1404(a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted.'" 363 U.S. at 342-43.

Consequently, whatever action the parties might have taken before or after the commencement of suit is of no bearing on the effect of Section 1404(a), since the action must be examined, not as it might have been, but as it was on the day it was commenced.

The corporate defendants' other attempt to minimize the importance of plaintiffs' lack of capacity to bring these suits in Massachusetts depends upon their flat statement that "if plaintiffs lack capacity to sue in Massachusetts, they are equally without capacity in Pennsylvania". Brief for Petitioners in No. 56, p. 23. In this, however, they are plainly mistaken.

Defendants are correct in stating that Rule 2207 of the Pennsylvania Rules of Civil Procedure requires that an action for wrongful death brought in Pennsylvania to enforce rights arising under the laws of another jurisdiction "shall be brought by the person

authorized to bring the action by the law of the jurisdiction where the cause of action arose." However, the decisions of the courts of Pennsylvania, as well as the decisions of this Court and the courts of Massachusetts, demonstrate that when the law of the jurisdiction where the cause of action arose vests that action in "the executor or administrator of the deceased," as does the Massachusetts statute, Mass. Ann. Laws, ch. 229, § 2 (Supp. 1962), the administrator or executor appointed in Pennsylvania may bring an action in Pennsylvania, regardless of his lack of capacity to sue in Massachusetts.

Rule 2207 "is declaratory of the Pennsylvania rule of conflict of laws". Note to Rule 2207, 332 Pa. cxix (1939). Goodrich, *Conflict of Laws,* § 104, p. 301 (1949), states that "unless the [foreign] statute limits suit to named beneficiaries, or a particular administrator or personal representative, an administrator appointed at the forum may institute the action." See Restatement, Conflict of Laws, § 396 (1934). This is the rule in Pennsylvania. *McIntyre* v. *Barr,* 85 Pa. D. & C. 507 (C.P. 1953); *Papciak* v. *Palmer,* 82 Pa. D. & C. 381 (C.P. 1952).

Defendants' cited case, *Brennan* v. *Rooney,* 139 F. Supp. 484 (E.D. Pa. 1956), is merely an example of one of the exceptions to the rule mentioned by Judge Goodrich, in that the New Jersey statute there involved vests the cause of action in the "administrator ad prosequendum." Since no such appointment exists under Pennsylvania law, capacity to sue in

Pennsylvania may be created only by appointment in New Jersey.

Plaintiffs' right to bring these actions in the forum of their appointment is also supported by a decision of this Court, *Dennick* v. *Railroad Co.*, 103 U.S. 11, 17-20 (1880), and by the weight of authority in other jurisdictions. Annotation, 52 A.L.R.2d 1016 (1957). The policy of Massachusetts also helps determine that the rights created by the statute of that state may be enforced in another forum without the appointment of a personal representative in Massachusetts. *Dickinson* v. *Jones*, 309 Pa. 256, 163 Atl. 516 (1932). Massachusetts has likewise adopted the view that such qualification is not necessary. *Hanlon* v. *Frederick, Leyland & Co.*, 223 Mass. 438, 111 N.E. 907 (1916).

In no sense whatever, then, under the law of Massachusetts, could these actions have been brought in that state. For this reason, as set forth below, the actions could not as a matter of law be transferred to the District of Massachusetts.

II. Transfer of these 37 representative actions to the District of Massachusetts would be improper.

Transfer of these 37 representative actions to the District of Massachusetts is precluded by the expressed intent of Congress as set forth in Section 1404(a), prior decisions of this Court and other courts and major considerations of policy embodied in the law of the states and the Federal Rules of Civil Procedure.

A. *Such transfer would be improper because of the expressed intent of Congress in 28 U.S.C. § 1404(a).*

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought." 28 U.S.C. § 1404(a).

These words are "unambiguous, direct and clear," "unequivocal" and establish "that Congress meant what it said." *Hoffman* v. *Blaski*, 363 U.S. 335, 343 (1960); *Ex parte Collett*, 337 U.S. 55 (1949).

These words thus defeat defendants' argument and prevent transfer of these 37 representative actions to Massachusetts.

Defendants argue that these words are not to be so taken, however, but rather were intended to convey a meaning in flat contradiction of the plain and unambiguous meaning. Defendants in effect rewrite the statute to read:

> "For the convenience of parties and witnesses, in the interests of justice, a district court may transfer any civil action to any other district or division where it might have been brought *against the defendant whether or not plaintiff could actually have brought it.*"

But nothing whatever in the statute itself, in its legislative history, or in the decided cases lends the slightest support to such construction.

In attempted support of their interpretation, corporate defendants argue. Brief in No. 56, pp. 10-11,

that the presence of § 1404(a) in the Venue Chapter of the Judicial Code indicates "that Congress intended the 'might have been brought' requirement to be limited to districts in which proper venue and jurisdiction existed," citing numerous instances of similar phrases in the Code.

Precisely that argument was rejected by this Court in *Ex Parte Collett*, 337 U.S. 55, 59 (1949) where the petitioners argued that the phrase "any civil action" as used in § 1404(a) was limited to only those classes of actions referred to in the preceding sections of the Code for which special venue provisions were made. To accept that contention, said this Court, would be to disregard the Congressional admonition that "No inference of a legislative construction is to be drawn by reason of the chapter in Title 28 . . . in which any section is placed . . .," citing the Act of June 25, 1948, 62 Stat. 869, 991, § 33.

The words "where it might have been brought" necessarily imply a plaintiff who could bring the action and necessarily exclude a plaintiff who could not "bring" the action. This is the meaning assumed to be correct by this and other courts when referring to the section. For example, in *Hoffman* v. *Blaski*, 363 U.S. 335, 344 (1960), this Court said:

> "But the power of a District Court under § 1404(a) to transfer an action to another district is made to depend not upon the wish or waiver of the defendant but, rather, upon whether the transferee district was one in which the ac-

tion 'might have been brought' *by the plaintiff.*" (Emphasis added.)

No more clear and unmistakable evidence of the "plain meaning" of those words could be found than the inferences drawn by this Court.

The expressed intent of Congress as it appears in § 1404(a) precludes the transfer of these cases to a district in which they could not have been brought by plaintiffs.

B. *Such transfer would be improper because of prior decisions of this and other courts.*

Defendants contend that § 1404(a) precludes a transfer only where the action could not be brought in the transferee district for lack of proper venue or jurisdiction of the person of defendant.

To the contrary, there are decisions in which transfer under § 1404(a) has been refused not for lack of venue or jurisdiction of the person of the defendant in the transferee district but for other reasons, including lack of jurisdiction of the subject matter and lack of capacity to sue, i.e., lack of jurisdiction of the person of the plaintiff.

For example, in the case of *Russell* v. *Cunningham,* 191 F. Supp. 82 (D. Guam 1961), plaintiff, a resident of California, brought a personal injury action in Guam against a defendant who was also a resident of California. After the complaint was filed, plaintiff moved under § 1404(a) to transfer the case to the United States District Court for the Northern

District of California. Defendant resisted the motion upon the ground that plaintiff could not have brought his action in the transferee court since both parties were residents of California.

The Court sustained defendant's position and refused the transfer on the ground that plaintiff could not have brought his action in the transferee court and therefore the Northern District of California was not a district in which the action "might have been brought" within the meaning of Section 1404(a).

In so holding, the district court cited *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), as authority and quoted this Court's statement that the power of a district court to transfer depends upon whether the transferee district was one in which the action "'might have been brought' by the plaintiff." 191 F. Supp. at 83, citing 363 U.S. at 343-44.

A similar decision on exactly the point involved in the instant case likewise refused transfer under § 1404(a) on the same ground even before *Hoffman* v. *Blaski*.

In *Felchlin* v. *American Smelting & Refining Co.*, 136 F. Supp. 577 (S.D. Calif. 1955), plaintiffs were executors appointed by the Superior Court of California. Their action in the United States District Court in California was founded on a contract between their testator and defendants, jurisdiction being based on diversity of citizenship. Defendants moved under Section 1404(a) to transfer to Texas. Plaintiffs opposed the motion, arguing that there had been no

appointment of a personal representative capable of bringing suit in that state. The court denied the motion to transfer and held:

> "[I]n all cases in which the doctrine of *forum non conveniens* comes into play, it presupposes at least two forums in which the defendant is amenable to process and in which the plaintiff may bring the action.
>
> * * * * *
>
> "It is well settled that unless such right is given to him by statute, an executor or administrator cannot sue in his representative capacity in any state or country other than that in which his letters testamentary or administration were granted . . .
>
> "Defendants contend that a foreign executor may sue in the Texas courts unless timely objection is made, and that in the instant case, the defendants have waived their objection by filing the motion to transfer." 136 F. Supp. at 579.

But the court rejected that argument by defendants, stating that plaintiffs did not have a right to bring the action in Texas and that therefore, as a matter of law, the court lacked the power to transfer the action to that district. 136 F. Supp. at 581-82.

Although the facts of the *Felchlin* case are virtually identical with those of the instant actions, defendants mention it only in footnotes. See Brief for Petitioners in No. 56, p. 15 n. 14; Brief for Petitioners in No. 80, p. 22 n. 29. They contend that it is distinguishable from the present actions because under

the law of Texas, the transferee forum in that case, a suit brought by a foreign personal representative is a nullity and objection to suit by a foreign administrator cannot be waived in Texas as in Massachusetts. Even assuming that such were the case, however, the distinction is irrelevant for transfer purposes because it serves only to make the dismissal of the action in the transferee district mandatory by the Court, as in situations involving jurisdiction of the subject matter, rather than optional to the defendant, as in situations involving venue. In *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), of course, lack of venue in the transferee district was held to bar transfer.

The most recent case pertinent to the present controversy, decided only a few months ago, is *Goranson* v. *Capital Airlines, Inc.*, U.S.D.C.E.D. Va., Richmond Div., C. A. No. 3545, April 10, 1963. Because of their special relevance, the order and memorandum of the court in that case are printed herewith as Appendices "A" and "B" respectively.

In that case, plaintiff Goranson, an administrator of the estate of a decedent killed in the crash of an airliner in Virginia, brought suit for wrongful death in the Northern District of Ohio where the decedent had been domiciled. On motion of defendants the case was transferred under Section 1404(a) to the Eastern District of Virginia. Plaintiff then commenced an action for mandamus in the Court of Appeals for the Sixth Circuit in order to prevent transfer, but the

petition was denied. *Goranson* v. *Kloeb*, 308 F.2d 655 (6th Cir. 1962.)[6]

When the transfer had been effected, plaintiff promptly moved in the transferee district for remand to the Northern District of Ohio on the ground that a fiduciary appointed in Ohio is without capacity to sue in Virginia and therefore his cause of action might not have been brought in Virginia. (Appendix B, p. 2a).

The district court granted plaintiff's motion and ordered that the action be remanded to Ohio. In so doing the court made a number of comments apposite to this case:

> "The plaintiff, who had no capacity to sue in Virginia, was under no mandate to move for the appointment of an ancillary administrator in order that the suit which he brought in Ohio might have been brought in Virginia.
>
> "This Court must consider this case in the posture that it was at the time plaintiff instituted it in Ohio. [quoting from *Hoffman* v. *Blaski*, 363 U.S. 335, 343 (1960).]
>
> * * *
>
> "At the time this case was filed in Ohio it could not have been brought in Virginia because the plaintiff lacked capacity to sue in Virginia.

[6] Defendants here cite this case as authority for transfer "even though plaintiff contended that the damages recoverable in the transferee forum would be less than those recoverable in the transferor forum." Brief for Petitioners in No. 56, p. 15 n. 16. In fact, in permitting the transfer the court of appeals stated expressly that the amount of damages recoverable would be subject to the identical limitation in both forums. 308 F.2d at 656.

At the time it was transferred to Virginia it could not have been brought in Virginia because he still lacked capacity to sue in Virginia. At the present time he lacks capacity to sue in Virginia.

"The Court is of the opinion that the Virginia statutes pertaining to the appointment of fiduciaries are so broad that the defendants could move for the appointment of an ancillary administrator, but this would avail them nothing. [quoting again from *Hoffman* v. *Blaski*, 363 U.S. 335, 342-343 (1960).]

* * * *

"The defendants contend that the plaintiff waived his right to relief under this motion '* * * by failing to raise and argue that point either before District Judge Kloeb or in the Mandamus proceeding before the Sixth Circuit'. . . . This contention is without merit. The question of capacity to sue raises an issue of jurisdiction over the person of the plaintiff. *Rybolt* v. *Jarrett*, 112 F.2d 642, 648 (4th Cir. 1940); *Holt* v. *Middlebrook*, 214 F.2d 187 (4th Cir. 1954). Jurisdictional questions can be raised at any time. Jurisdiction must be reexamined by the transferee court. *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

"While jurisdiction over the person may be waived, *Hoffman* v. *Blaski, supra*, at 343, the plaintiff has done no act to waive it. He has resisted the transfer to Virginia, and the maintenance of this suit in Virginia at every opportunity. As a non-resident of Virginia, he is not charged with knowledge of Virginia law. Further-

more, the burden was not upon plaintiff to satisfy the requirements of 1404(a)." Appendix B, pp. 6a-8a.

Nor does the decision in *Continental Grain Co.* v. *Barge FBL-585*, 364 U.S. 19 (1960), upon which defendants place great reliance, support their arguments. This Court there held that an admiralty *in rem* action was in substance an action against the owner of the *res* and that if the owner could have been sued personally in the transferee district the action may be transferred to that district, although the *res* itself was not within the jurisdiction of the transferee court when the action was brought. Throughout its opinion this Court emphasized the fictional nature of the action against the ship and commented:

> "We are asked here, however, to transplant this ancient salt-water admiralty fiction into the dry-land context of *forum non conveniens*, where its usefulness and possibilities for good are questionable at best." 364 U.S. at 23.

The court of appeals properly distinguished the decision in *Continental Grain*, commenting that it "is no help to defendants for that decision is premised on a fiction peculiar to the admiralty law." 309 F.2d at 957 (R. 76).

In addition, the *Continental Grain* case is distinguishable because the plaintiff, which resisted the transfer, was already engaged in litigation with the movant defendant in the transferee district on "pre-

cisely the same issues" raised in the action in the transferor court. 364 U.S. at 25-26.

The weight of authority in this and other courts thus supports the position of plaintiffs and gives no basis for that of defendants.[7] It negates defendants' unsupported contention that the phrase "where it might have been brought" relates only to lack of venue or jurisdiction of the person of the defendant as distinguished from that of the plaintiff and precludes a transfer of the instant cases.

C. Such transfer would be improper because of major considerations of federal and state policy embodied in Federal Rule of Civil Procedure 17(b).

Most of the states, forty-four of fifty, have decided as a matter of policy that out-of-state administrators may not sue in their courts. They have specifically so provided by statute. See citations collected in corporate Petitioners' Brief in No. 56, pp. 17-19.

In this connection, the Government, Brief in No. 80, pp. 13-22, makes the point that the phrase "might have been brought" relates only to federal law and has no reference to state law as such. Assuming, *arguendo*, that this position were well taken, nonetheless the Federal Rules of Civil Procedure have expressly engrafted the policies of the individual states into the scheme of federal procedure. Those rules de-

[7] The cases cited by the Government, Brief for Petitioners in No. 80, p. 23 n. 29, as contrary authority do not even mention the lack of plaintiffs' capacity to sue in the proposed transferee districts, if such capacity were lacking.

clare that the capacity of a fiduciary to sue in a United States district court shall be determined by the law of the state in which the district court is held. Fed. R. Civ. P. 17(b).

From the point of view of local policy, there are substantial reasons why the states exercise a measure of control over foreign fiduciaries. Such legislation is designed, inter alia, to protect local citizens who are potential defendants from suits by more than one fiduciary purporting to represent the same decedent and protect all persons from losses caused by the actions of irresponsible out-of-state fiduciaries.

To circumvent the local safeguards of forty-four states by permitting unqualified out-of-state fiduciaries to bring suit on behalf of their decedents in the local United States district court would be a grave affront to the policies of those states and contrary to the federal policy expressed in Rule 17(b).

Since plaintiffs here were not qualified to sue in Massachusetts, they were not qualified to sue in the United States district court in Massachusetts and the District of Massachusetts was not a district in which these actions "might have been brought."

III. Transfer under these circumstances would be contrary to the interest of justice.

Other considerations in addition to those referred to by the court of appeals in the instant case and by this Court in *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), furnish substantial independent grounds for

the refusal to transfer these cases from the forum in which plaintiffs brought them properly and in good faith. These considerations give meaning to the phrase "interest of justice" which appears in Section 1404(a) and demonstrate that a transfer of these cases would violate essential concepts of basic fairness and justice.

A. *Transfer would be contrary to the interest of justice because it would cause great expense, inconvenience and delay to plaintiffs and would unreasonably impair their right to select the forum.*

Within the requirements of proper venue, a plaintiff may sue in the forum of his choice. Unless the balance is strongly in favor of granting relief to the defendant, "the plaintiff's choice of forum should rarely be disturbed." *Gulf Oil Corp* v. *Gilbert*, 330 U.S. 501, 508 (1947).

This is particularly true where, as here, all but one of the plaintiffs brought suit in the forum of their domicile, Pennsylvania, as fiduciaries representing estates of decedents domiciled in Pennsylvania at the time of their death.

Moreover, in this case most of plaintiffs' compensatory damage witnesses come from the Eastern District of Pennsylvania or near it (R.6), and other witnesses will probably be called from as far away as Indiana and California (R.7) to whom the difference between Philadelphia and Boston is *de minimis*.

Transfer of these actions would impose upon plaintiffs the heavy additional difficulties and expenses of conducting from Philadelphia litigation in Boston. Defendants have made no showing that plaintiffs are able to bear them. This was defendants' burden, *cf. Gulf Oil Corp* v. *Gilbert,* 330 U.S. 501, 508 (1947), and defendants presented no evidence to sustain it.

The harsh imposition of transfer upon plaintiffs in frank derogation of their right to select their forum resulted in part at least from a concern that, unless the cases are brought together before a single judge, there may be some plaintiffs who will recover damages as a result of the subject airplane disaster and some who will not (R. 10). The defendants appear to urge that this possibility of inconsistent verdicts is so undesirable as to justify transfer regardless of the other circumstances of these cases.

But it is not possible to transfer to Boston all cases arising out of this accident. At least two such cases are awaiting trial in the Court of Common Pleas of Philadelphia County[1] from which they cannot be removed to the federal courts, much less transferred by them. There may well be other similar actions pending in courts of other states. Thus, the issue of liability for this air crash must be litigated in Philadelphia and, perhaps, elsewhere.

Moreover, Section 1404(a) is not the basis for

[1] *Shackton* v. *Eastern Air Lines, Inc.* (two cases), C. P. No. 4, Sept. Term, 1961, No. 238 and C. P. No. 6, Sept. Term, 1961, No. 237 (Phila. Co.).

a transfer designed to promote "efficiency" or "uniformity" at the cost of great inconvenience and expense to plaintiffs. Section 1404(a) does not permit a transfer for such reasons. Indeed, the section does not even permit a transfer "in the interest of justice" but only "for the convenience of parties and witnesses, in the interest of justice."

All but three of these 30 plaintiffs in good faith exercised their undisputed right to select their forum by choosing the one closest to them. This was a reasonable and valid choice which was theirs as a matter of right. An order of transfer, at great inconvenience, delay and expense to these plaintiffs, even though for the benefit of defendants, is an improper invasion of their right to choose their forum.

B. *Transfer would be contrary to the interest of justice because it would prohibit the expeditious disposition of aircraft disaster cases.*

Throughout both defendants' briefs and the opinion of the district court there is a basic theme, sometimes implied, sometimes expressed, that trial and disposition of the pending cases will be expedited if they are consolidated with those similar cases originally brought in Massachusetts. In ordering transfer, Judge Van Dusen directed a major section of his opinion to this point, captioning it:

> *"Consolidation of all the cases arising from this accident for purposes of proceedings before trial is likely to procure fairer and more orderly trials for all litigants and save needless time and ex-*

pense for the public, including jurors, and other litigants awaiting trial." (R. 8).

The corporate defendants make the same claim. Brief for Petitioners in No. 56, pp. 16-17.

There is no question that this contention of both the lower court and defendants has a certain appeal —in theory. But the reality is otherwise.

The reported case noted below and the general experience of trial courts establish that consolidation of airplane disaster cases for pretrial and for trial does not achieve savings in time and expense for the courts, the parties, the witnesses or the public. To the contrary, such consolidation in mass aircraft disaster litigation serves to delay the disposition of cases and to produce results not in the interest of justice. For example, it is evident that:

a. Discovery is greatly protracted by consolidation. Discovery by one or a few plaintiffs' counsel is far more expeditious than simultaneous discovery in all cases by all counsel,[8] and where one or a few plaintiffs proceed alone with discovery there is very little likelihood of substantial additional discovery by other counsel in companion cases.

b. Consolidation strongly discourages settlement by or with individual plaintiffs which in turn deprives certain individual plaintiffs of prompt recovery and deprives defendants of "discounted" compromises.

[8] In the briefs on the merits filed in this proceeding, there are *eight* individual law firms named. This list, of course, does not include those other lawyers whose appearances are entered in the Massachusetts cases.

c. Consolidation induces the prosecution of actions against all possible defendants by all plaintiffs where, proceeding individually, much of such effort would be tactically and practically unnecessary.

d. A joint trial involving numerous parties is far more cumbersome and inefficient than the trial of a single plaintiff's case, and the trial of a single plaintiff's case can, and in all likelihood would, serve as a basis for settlement of most if not all of the remaining actions.

Data as to the foregoing inferences are of course unreported but it is not plaintiffs' burden to prove in these proceedings that transfer would delay the ultimate disposition of these cases. Were the court authorized by § 1404(a) to order transfer at great expense, inconvenience and delay to plaintiffs and their witnesses for the sake of "expediting" disposition of the cases, then minimum standards of justice would require that defendants, the moving parties, satisfy the court by credible evidence that transfer actually would expedite disposition. No evidence of any such nature was proffered by defendants in this case, however.

But there is available some evidence to show what happens when aircraft disaster cases are consolidated. It merits attention here as an example of the evils of consolidation described above.

On April 21, 1958, a United Airlines DC-7 passenger craft was struck in mid-air by a fighter plane

of the United States Air Force, causing the death of forty-two passengers. Twenty-two cases were initiated in or transferred to the Southern District of California and all were consolidated there for all purposes. Discovery was conducted by all counsel in concert and depositions were taken in three districts.

Despite the fact that these cases, as well as those in two other districts, were assigned to the same judge, and despite the relative simplicity of the accident,[10] discovery proceedings were in the opinion of that court "'exceedingly extensive, expensive and burdensome in time and effort.'" *United States* v. *United Air Lines, Inc.*, 216 F. Supp. 709, 712 (E. D. Wash., D. Nev. 1962).

That court then went on to say:

> "In spite of the efforts of the Court to do everything possible to bring about an expeditious trial and prevent delays in the Southern California cases, and in spite of the very great diligence of counsel in their conduct of discovery proceedings, a pre-trial order could not be framed and a definite trial date set until October, 1961, [the accident having occurred on April 21, 1958] at which time the cases were set for trial on February 6, 1962. The time then estimated for trial on liability was six weeks, but actually took 15 weeks." 216 F. Supp. at 713.

[10] In contrast to the instant cases, where the aircraft crashed on takeoff in good weather, and where there are still open questions of airframe design, engine design, crew training, airport maintenance, traffic control, and migratory bird habits, to name only some.

The Court went on to relate the history of the case, including the fact that there were separate trials to the same jury on damages, the last verdict being returned on August 31, 1962, almost four and one-half years after the accident. Finally, in its opinion dated December 7, 1962, the Court said, "Since August 31, 1962, the Court's time from day to day, until recently, has been almost completely consumed with the arguments . . . and . . . prolonged hearings with counsel . . ." 216 F. Supp. at 713.

Consolidation means that every one of numerous parties and attorneys must be afforded every opportunity to participate in every stage of the proceedings whereas, left to their own efforts, a few plaintiffs will prosecute their cases as far as may be necessary and the vast majority will settle on the basis of their result.

Just as a committee of 30 will expectably accomplish less in a given time than a committee of three, so too the disposition of airplane disaster cases is delayed, not expedited, by mass consolidation.

C. *Transfer would be contrary to the interest of justice because it would gravely prejudice plaintiffs' substantive rights under the law of damages.*

While defendants do not so state, it is not unlikely that their ultimate reason for seeking transfer is to move to a forum where recoveries for wrongful death are restricted to sharply limited punitive damages rather than compensation for the loss suffered.

Massachusetts and Alabama are the only two states in the United States having statutes imposing a penal or punitive restriction on damages for wrongful death. *Massachusetts Bonding & Insurance Co.* v. *United States,* 352 U.S. 128, 130-131 (1956).

The Massachusetts wrongful death act, Mass. Ann. Laws, ch. 229, § 2 (Supp. 1962), provides with respect to accidents occurring prior to January 1, 1963, that a person who negligently causes the death of another "shall be liable in damages in the sum of not less than two thousand nor more than twenty thousand dollars, to be assessed with reference to the degree of his culpability . . . ."

The Massachusetts law is based solely on culpability of the tort-feasor without regard to the pecuniary loss suffered by defendent's nearest relatives. This Court so held in *Massachusetts Bonding & Insurance Co.* v. *United States,* 352 U.S. 128, 129 (1956), quoting from the decision in *Macchiaroli* v. *Howell,* 294 Mass. 144, 147, 200 N.E. 905, 906-907 (1936), which held that "The chief characteristic of the statute is penal." Compensatory damages may not be awarded as they would be under Pennsylvania law. 12 Pur. Pa. Stat. Ann. §§ 1601-1604 (1953); *Spangler* v. *Helm's N.Y.-P. Motor Express,* 396 Pa. 482, 153 490 (1959).

Pennsylvania forbids such a limitation of damages in death actions. The Pennsylvania Constitution, Art. III, § 21, provides that the General Assembly may enact workmen's compensation laws, "but in no

other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death. . . ." Because of the policy reflected in this constitutional provision, there is strong reason to believe that Pennsylvania courts would not enforce the penal limitation on damages contained in the Massachusetts act. If they would not, a federal district court sitting in Pennsylvania must also refuse to enforce that limitation. *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941).

The strength of this public policy is shown by the decisions of the Supreme Court of Pennsylvania which hold that statutory limitations on recovery in actions for negligence are violative even of the general guarantees contained in the Pennsylvania Declaration of Rights. *Thirteenth & 15th St. Passenger Ry* v. *Boudrou*, 92 Pa. 475, 481-82 (1880); *Lombard & So. Sts. Passenger Ry.* v. *Steinhart*, 2 Pennypacker 358 (Pa. Supreme Ct. 1882); *Central Ry* v. *Cook*, 1 Pa. Weekly Notes of Cases 319 (Pa. Supreme Ct. 1875).

Furthermore, the Pennsylvania courts will not enforce the penal provisions of a foreign statute, even when those provisions are also remedial in nature. *Nesbitt* v. *Clark*, 272 Pa. 161, 116 Atl. 404, *cert. denied*, 258 U.S. 621 (1922); *Commercial National Bank* v. *Kirk*, 222 Pa. 567, 71 Atl. 1085 (1909).

While Pennsylvania courts have not yet considered the Massachusetts statute, both state and federal courts in New York have adopted and set

forth the rule which Pennsylvania is most likely to follow.

In *Kilberg* v. *Northeast Airlines, Inc.*, 9 N.Y.2d 34, 172 N.E.2d 526 (1961), plaintiff's decedent was killed in an airplane crash in Massachusetts. Both plaintiff's decedent and the plaintiff were New York domiciliaries. The plaintiff brought suit for wrongful death in the state courts of New York. The New York Court of Appeals, in an opinion by Chief Judge Desmond, declared that New York would refuse to give effect to the Massachusetts penal provision limiting recovery because that provision contravened the public policy of the state of New York.

The Court of Appeals further held that the plaintiff could recover the compensatory damages which are recoverable under the New York wrongful death act, without any of the restrictions imposed by Massachusetts. The court looked to and quoted from Article 1, Section 16, of the New York Constitution as an expression of the public policy of that state. It provides that "the right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

Subsequently, in *Pearson* v. *Northeast Airlines, Inc.*, 309 F.2d 553 (2d Cir. 1962), *cert. denied*, 372 U.S. 912 (1963), the United States Court of Appeals for the Second Circuit, sitting *en banc*, reversed the decision of a panel of the Court of Appeals, 307 F.2d 131 (1962), and held that the *Kilberg* principle is

fully consistent with the Constitution of the United States.

The rejection by New York of the penal limitations of the Massachusetts act is more than likely to be followed by the Pennsylvania courts. This is so, not only because of the reasons with regard to "contacts", but also because of the analogous New York and Pennsylvania constitutional prohibitions.

In both the spirit and the letter of Section 1404(a) are the inseparable concepts of convenience *and* justice. In the absence of either concept a transfer fails to fulfill the statutory purpose. Justice still means giving each what he deserves; doing that which is fair. Such principles would be torn asunder by transferring these cases to a forum which is not only inconvenient and expensive for these plaintiffs and many of the essential witnesses, but which would impose upon their substantial claims a harshly restrictive punitive measure of damages which is alien to the law of the jurisdiction where their decedents resided at the time of their death; where substantially all of their interested survivors still reside; where almost all of the fiduciaries are domiciled and received their court appointments; in which all decedents made their ill-fated contracts of transportation; to which all of them were returning when death struck; and where all of the defendants do business.

"Convenience" cannot here overbalance the enormous potential loss to 37 plaintiffs and their beneficiaries which might result from transfer. The expense

to the four defendants of a trial in the District Court in Pennsylvania cannot outweigh the detriment that 23 estates will suffer should they be subjected to the radically different measure of damages which Massachusetts would apply to these suits. An order placing convenience ahead of the protection of substantive rights and the private interest of the litigant violates rather than furthers the interest of justice.[11]

This Court, in *Gulf Oil* v. *Gilbert*, 330 U.S. 501, 508 (1947), prior to the enactment of Section 1404(a), listed the "private interest of the litigant" first among the factors to be considered in this situation. That is still true under Section 1404(a). In *Norwood* v. *Kirkpatrick*, 349 U.S. 29 (1955), this Court held that even though the discretion under Section 1404(a) is broader than under the former doctrine of *forum non conveniens*, "this is not to say that the relevant factors have changed or that the plaintiff's choice of forum is not to be considered . . . ." 349 U.S. at 32. Even under *Norwood* "'the interest of justice' still remains the primary and decisive factor" in the determination of transfer motions. *Coffill* v. *Atlantic*

[11] Transfer of these cases to Massachusetts would create additional issues involving the application to transferred cases of the doctrines of *Erie R.R.* v. *Tompkins*, 304 U.S. 64 (1938), and *Klaxon Co.* v. *Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). There is a conflict of authority on the crucial issue of whether the transferee court must apply the whole law of the transferor state, including that state's conflicts principles and public policy. Compare *Headrick* v. *Atchison T. & S.F. Ry.*, 182 F.2d 305 (10th Cir. 1950) and *King Bros. Productions, Inc.* v. *RKO Teleradio Pictures, Inc.*, 208 F. Supp. 271 (S.D.N.Y. 1962), with *Viaggio* v. *Field*, 177 F. Supp. 643 (D. Md. 1959) and *Brainard* v. *Atchison T. & S.F. Ry.*, 87 F. Supp. 921 (D. Kan. 1950). See generally Currie, *The Erie Doctrine and Transfer of Civil Actions*, 17 F.R.D. 353 (1955).

Coast Line R.R., 180 F. Supp. 105, 107-8 (E.D.N.Y. 1960).

Pennsylvania has no less an interest in the protection of its domiciliaries than does New York as to its citizens. The most significant factor here involved is plaintiffs' need to have so fundamental an issue as the proper measure of damages in these actions brought in Pennsylvania determined in the district of their permanent Pennsylvania residence, where the policy of state law will probably prevent the emasculation of their claims which may occur in the distant forum.

Coupled with the above considerations is the additional truth that it would be injudicious and unfair for the district court in Massachusetts to make a fundamental determination of Pennsylvania law upon which the courts of Pennsylvania have not spoken. The district court in Pennsylvania, on the other hand, together with the United States Court of Appeals for the Third Circuit, is familiar with the substance and underlying philosophy of Pennsylvania law. This Court has said, when speaking of "the intermediate federal appellate courts", that "the expression of the views of the judges of those courts, who are familiar with the intricacies and trends of local law and practice, if not indispensable, is at least a highly desirable and important aid to our determination of state law questions." *Huddleston* v. *Dwyer*, 322 U.S. 232, 237 (1944). Cf. *Ragan* v. *Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949). Wisdom and

propriety dictate that this crucial determination of Pennsylvania law be made by the district court sitting in Pennsylvania.

IV. Mandamus is a proper remedy here.

All defendants below and the Government in this Court have suggested that mandamus was not available to plaintiffs as a remedy, even if the trial court's order of transfer were improper.[12] They base this suggestion on two contentions:

(1) Plaintiffs failed to avail themselves of the Interlocutory Appeals Act, 28 U.S.C. § 1292, and

(2) Mandamus should not be used to review an order of transfer.

Neither of these contentions withstands analysis.

The Government maintains that "Respondents should have proceeded by seeking to invoke the Interlocutory Appeals Act, 28 U.S.C. 1292(b)" (Brief for Petitioners in No. 80, p. 27), but that Act states, in pertinent part:

> "When a district judge, in making in a civil action an order not otherwise appealable under this section, shall be of the opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from

[12] Judge Van Dusen by a footnote to his brief filed in the Court of Appeals refused to "join in presenting this question [of the propriety of mandamus] for review . . . because he does not wish to object to an attempt to review his actions on [other] grounds." Brief for Respondent and Intervenors, 3d Cir., Nos. 13994, 13997, 14003, 14011, and 14033, p. 1 n.

> the order may materially advance the ultimate termination of the litigation, he shall so state in writing in such order. The Court of Appeals may thereupon, in its discretion, permit an appeal to be taken from such order, if application is made to it within ten days after the entry of the order . . . ."

Under the Act an interlocutory appeal is possible only if the lower court includes the necessary statement in his order. No such statement appears in the order in this case (R. 21-22) or in the accompanying opinion (R. 1-20).

In a recent article Professor Charles Alan Wright wrote:

> "The statute seems to leave the initiative to the trial judge to certify the case as appropriate for appeal, and does not require, nor even expressly contemplate, an application for the requisite certificate from the parties." Wright, The Interlocutory Appeals Act of 1958, 23 F.R.D. 199, 207 (1959).

See also *Milbert* v. *Bison Laboratories, Inc.*, 260 F.2d 431, 433 (3d Cir. 1958), where the Court of Appeals for the Third Circuit commented that "both the district judge and the court of appeals are to exercise independent judgment in each case . . . ." Nor is there any requirement in the Federal Rules of Civil Procedure or in the Rules of the Eastern District of Pennsylvania that an aggrieved party make application to the court for such a certificate.

But in any event the writ of mandamus is available to review orders of transfer. As the Government concedes, this is exactly what was done by the court of appeals in *Hoffman* v. *Blaski*, 363 U.S. 335 (1960), and, tacitly at least, approved by this Court.

In spite of that recent precedent, the Government argues that the decision in *Bankers Life & Casualty Co.* v. *Holland*, 346 U.S. 379 (1953), may somehow bar use of the writ. In that case this Court affirmed the dismissal by the Court of Appeals for the Sixth Circuit of an application for mandamus where, after an order of transfer under Section 1406(a) of the Judicial Code because of lack of venue, plaintiff complained that proper venue had existed in the transferor district.

Mr. Justice Clark, speaking for the majority, described plaintiff's argument as "frivolous" and held, inter alia, that the petitioner had failed to show that its rights to issuance of the writ was "clear and indisputable" 346 U.S. at 384.[13] The remaining features of the *Holland* case which distinguish it from the instant controversy are fairly set out in the Government's brief.

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[13] Mr. Justice Frankfurter, dissenting on the ground that the writ of certiorari should have been dismissed as improvidently granted, emphasized the weakness of the plaintiff's argument when he said:

"Discussion of mandamus in this case is not even useful as *dicta* for future guidance on an important issue . . . This Court ought not to be called upon to hold that where a district judge refused to entertain a 'frivolous' claim, mandamus will not issue to compel him to entertain it. But that is the only holding of the Court's decision today." 346 U.S. at 387-88.

On the other hand, there is ample and convincing precedent for plaintiffs' position that mandamus does lie for the review of improper orders of transfer. The basic authority is the All Writs Act which reads:

> "The Supreme Court and all other courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

Appellate courts of several circuits have expressly held that, under the All Writs Act, mandamus lies to review an order of transfer. *Swindell-Dressler Corp.* v. *Dumbauld*, 308 F.2d 267 (3d Cir. 1962); *Lemon* v. *Druffel*, 253 F.2d 680 (6th Cir.), *cert. denied*, 358 U.S. 821 (1958); *Chicago R. I. & P.R.R.* v. *Igoe*, 212 F.2d 378 (7th Cir. 1954), 220 F.2d 299 (1955), *cert. denied*, 350 U.S. 822 (1955). This is certainly true, regardless of other limitations, where the trial court has granted or denied transfer erroneously as a matter of law. *Paramount Pictures, Inc.* v. *Rodney*, 186 F.2d 111 (3d Cir.), *cert. denied*, 340 U.S. 953 (1951).

As the court of appeals said in its opinion in the matter now before the Court, it is "abundantly clear that mandamus is appropriate when the question presented is whether the district court acted without jurisdiction in granting a motion to transfer under § 1404(a)." 309 F.2d at 956-57 (R. 73).

CONCLUSION

For the reasons stated the decision of the court of appeals directing that the order of transfer be vacated should be affirmed.

Respectfully submitted,

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
Civil Action No. 3545

HENRY W. GORANSON,
ADMINISTRATOR OF THE ESTATE OF
HAROLD T. GORANSON

v.

CAPITAL AIRLINES, INC.,
UNITED AIRLINES, INC., ET AL.

ORDER

Upon consideration of the plaintiff's motion to transfer this action back to the United States District Court for the Northern District of Ohio, Western Division, for reasons stated in the Memorandum of the Court this day filed, it is

ORDERED that the motion is sustained and this action is transferred to the United States District Court for the Northern District of Ohio, Western Division.

Let the Clerk send copies of this order and of the Memorandum of the Court to:

JOSEPH J. LAWLER, JR., *Esquire*
HENRY W. GORANSON, *Esquire*
RALPH H. FERRELL, JR., *Esquire*
HARRY E. McCOY, *Esquire*
JACK N. HEROD, *Esquire*
ISRAEL STEINGOLD, *Esquire*

/s/ JOHN D. BUTZNER, JR.
United States District Judge

April 10, 1963

[Duly certified as a true and full copy by C. B. Watkins, Clerk of the United States District Court for the Northern District of Ohio, October 4, 1963, certificate omitted in printing.]

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
Richmond Division
Civil Action No. 3545

HENRY W. GORANSON,
ADMINISTRATOR OF THE ESTATE OF
HAROLD T. GORANSON

v.

CAPITAL AIRLINES, INC.,
UNITED AIRLINES, INC., ET AL

JOSEPH J. LAWLER, *Esquire*
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HENRY W. GORANSON, *Esquire*
(COBOURN, YAGER, SMITH and FALVEY, *Esquires*)
For Plaintiff

HARRY E. MCCOY, *Esquire*
(SEEWELL, MCCOY, WINSTON and DALTON, *Esquires*)
For Defendants

MEMORANDUM OF THE COURT.

This memorandum concerns the motion of Henry W. Goranson, Administrator, to transfer this action back to the United States District Court for the Western Division, Northern District of Ohio. Although the plaintiff calls it a motion to transfer, it will be referred to as a motion to remand. In order to understand this motion, it is necessary to briefly consider the proceedings in the case.

The cause of action arises from the death of Captain Harold T. Goranson, United States Navy, which occurred on January 18, 1960, while he was a passenger in a Capital Airlines plane that crashed in Virginia.

On February 13, 1960, the last will and testament of the decedent was admitted to probate by the Probate Court of Wood County, Ohio, and letters of administration with the will annexed were issued to Henry W. Goranson, who duly qualified as administrator.

On November 14, 1961, Henry W. Goranson, Administrator, filed suit against Capital Airlines and United Airlines in the District Court of the Northern District of Ohio, Western Division, Civil Action #8752, to recover damages for the death of Harold T. Goranson.

On January 12, 1962, the plaintiff caused Joseph J. Lawler to be appointed ancillary administrator, c.t.a., of the Estate of Harold T. Goranson in the Circuit Court of the City of Norfolk.

On January 15, 1962, Joseph J. Lawler, Administrator, filed suit in the Norfolk Division of the United States District Court for the Eastern District of Virginia against Capital Airlines, Inc., United Airlines, Inc., Vickers-Armstrongs (Aircraft) Ltd., and Rolls-Royce, Limited, to recover damages for the death of Harold T. Goranson.

On February 23, 1962, the defendants moved to transfer this suit which was pending in the Northern District of Ohio to the Eastern District of Virginia.

On May 22, 1962, the motion was granted. Thereafter, the plaintiff brought a mandamus proceeding in the United States Court of Appeals for the Sixth Circuit, to review the order of the District Court. The petition for mandamus was denied. *Henry W. Goranson, etc.* v. *Honorable Frank L. Kloeb*, 308 F. 2d 655 (6th Cir. 1962).

In order to understand the motion to remand it is necessary to consider briefly the original motion made by the defendants in the United States District Court in Ohio.

That motion was based upon four grounds: the convenience of the parties and witnesses; the interest of justice; for the reason that the action might have been brought in Virginia; and finally, for the reason that a similar action is presently pending in Virginia. The plaintiff opposed the motion by joining issue with the defendants on their allegations and by affirmatively urging that the case be retained in Ohio because Virginia has a $30,000.00 limitation for wrongful death suits and Ohio has none.

This Court holds that the issues raised in Ohio on the defendants' motion to transfer and the plaintiff's opposition thereto have been settled by the United States District Court for the Northern District of Ohio and the Court of Appeals for the Sixth Circuit. These issues will not be reexamined by this Court in this proceeding.

In the plaintiff's motion to remand he takes the position that as a fiduciary appointed in Ohio he is without capacity to sue in Virginia and for that reason the cause of action could not be brought in Virginia. An examination of the defendants' motion, the briefs filed by the parties, the memorandum of the United States District Court for the Northern District of Ohio and the opinion of the Court of Appeals for the Sixth Circuit, leads this Court to believe that the question of plaintiff's capacity to bring suit in Virginia was not raised on the motion to transfer from Ohio to Virginia.

The narrow issue presented by the plaintiff's motion to remand is whether the action might have been brought in this Court. This issue must be examined by this Court. *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

Title 28 U.S.C., § 1404(a) provides:

> "For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division *where it might have been brought.*"

Rule 17(b) of the Federal Rules of Civil procedure provides, in part:

> "• • •. In all other cases capacity to sue or be sued shall be determined by the law of the state in which the district court is held • • • •."

Section 8-634, Code of Virginia, 1950, provides, in part, that every action for wrongful death:

> "• • • shall be brought by and in the name of the personal representative of such deceased person • • •."

Section 26-59, Code of Virginia, 1950 as amended, provides, in part:

> "No natural person not a resident of this State shall be appointed or allowed to qualify or act as personal representative, or trustee under a will, of any decedent, • • •."

The foregoing statutes and Rule 17(b), Federal Rules of Civil Procedure, prohibit Goranson, the Ohio administrator, from instituting an action for wrongful death in Virginia. *Holt* v. *Middlebrook*, 214 F. 2d 187 (4th Cir. 1954); *Grady* v. *Irvine*, 254 F. 2d 224 (4th Cir. 1958).

In *Barrack* v. *Van Dusen*, 309 F. 2d 953 (3rd Cir. 1962), the Court held that a civil action could not be transferred from the United States District Court for the Eastern District of Pennsylvania to the United States District Court for the District of Massachusetts. In that case the plaintiff was the administrator of a person who had been killed in an airplane crash. The plaintiff lacked capacity to sue in Massachusetts. The Court said at 309 F. 2d 957:

> "We think that the holding in Hoffman *v.* Blaski, supra, compels the conclusion that respondent was without power to transfer these actions. The import of that decision is that unless the plaintiff *had an unqualified right to bring suit* in the transferee forum

at the time he filed his original complaint, transfer to that district is not authorized by § 1404(a). * * *."

In *Barrack,* the Court pointed out that in Massachusetts the appointment of an ancillary administrator was discretionary with the Court. For this reason the defendants urge that *Barrack* is not controlling. The defendants emphasize that under the Virginia law a probate court must appoint an ancillary administrator and the Court's discretion is limited only to the appointment of a suitable person. §§ 64-112, 114, 124, Code of Virginia, 1950.

The difference between the Massachusetts law and the Virginia law is not a sound basis for distinguishing *Barrack* from the case at bar. At 309 F. 2d 957, 958, Judge Staley said:

> "The argument that petitioners could have brought these suits in Massachusetts, irrespective of the waiver of intervenors, by obtaining ancillary appointment misses the mark, for it ignores the fact that such appointment is discretionary with the probate court. Mass. Ann. Laws, C. 193, § 10. Of course, it is quite likely that most of those petitioners would have been so appointed. That, however, is immaterial, for the fact remains that here, as in Hoffman, petitioners did not have an independent right to maintain suit in Massachusetts.
>
> "* * * *. Finally, we must accept § 1404(a) as it has been construed by the Supreme Court in Hoffman *v.* Blaski, supra, i.e., that it permits transfer only if the plaintiff at the time of the commencement of the action had an independent right to institute suit in the transferee district."

The plaintiff, who had no capacity to sue in Virginia, was under no mandate to move for the appointment of an ancillary administrator in order that the suit which he brought in Ohio might have been brought in Virginia.

This Court must consider this case in the posture that it was at the time the plaintiff instituted it in Ohio. In *Hoffman* v. *Blaski*, 363 U.S. 335, 343 (1960), Mr. Justice Whittaker states:

> "* * *. The transferee courts could have acquired jurisdiction over those actions only if properly brought in those courts, or if validly transferred thereto under Section 1404(a). * * *."

At the time this case was filed in Ohio it could not have been brought in Virginia because the plaintiff lacked capacity to sue in Virginia. At the time it was transferred to Virginia it could not have been brought in Virginia because he still lacked capacity to sue in Virginia. At the present time he lacks capacity to sue in Virginia.

The Court is of the opinion that the Virginia statutes pertaining to the appointment of fiduciaries are so broad that the defendants could move for the appointment of an ancillary administrator; but this would avail them nothing. Mr. Justice Whittaker said in *Hoffman* v. *Blaski*, 363 U.S. 335, 342-343 (1960):

> "* * *. We do not think the Section 1404(a) phrase 'where it might have been brought' can be interpreted to mean, as petitioners' theory would require, 'where it may now be rebrought, with defendants' consent.' This Court has said, in a different context, that Section 1404(a) is 'unambiguous, direct (and) clear,' *Ex parte Collett*, 337 U.S., at 58, and that 'the unequivocal words of Section 1404(a) and the legislative history * * * (establish) that Congress indeed meant what it said.' *United States* v. *National City Lines, Inc.*, 337 U.S. 78, 84. Like the Seventh Circuit, 260 F. 2d, at 322, we think the dissenting opinion of Judges Hastie and McLaughlin in *Paramount Pictures, Inc.* v. *Rodney*, 186 F. 2d 111 (C.A. 3rd Cir.), correctly answered this contention:

'But we do not see how the conduct of a defendant after suit has been instituted can add to the forums where 'it might have been brought.' In the normal meaning of words this language of Section 1404(a) directs the attention of the judge who is considering a transfer to the situation which existed when suit was instituted.'"

The defendants contend that the plaintiff waived his right to relief under this motion "* * * by failing to raise and argue that point either before District Judge Kloeb or in the Mandamus proceeding before the Sixth Circuit". (Page 10, Defendants' brief on motion). This contention is without merit. The question of the capacity to sue raises an issue of jurisdiction over the person of the plaintiff. *Rybolt* v. *Jarrett*, 112 F. 2d 642, 648 (4th Cir. 1940); *Holt* v. *Middlebrook*, 214 F. 2d 187 (4th Cir. 1954). Jurisdictional questions can be raised at any time. Jurisdiction must be reexamined by the transferee court. *Hoffman* v. *Blaski*, 363 U.S. 335 (1960).

While jurisdiction over the person may be waived, *Hoffman* v. *Blaski*, *supra*, at 343, the plaintiff has done no act to waive it. He has resisted the transfer to Virginia, and the maintenance of this suit in Virginia at every opportunity. As a non-resident of Virginia, he is not charged with knowledge of Virginia law. Furthermore, the burden was not upon the plaintiff to satisfy the requirements of 1404(a). It was the defendants who moved for transfer, and failed to bring this matter to the attention of the United States District Court in Ohio.

The defendants also assert that since an identical suit was brought by Goranson, Administrator, through the ancillary administrator Lawler in the Virginia court, that this Court does have jurisdiction of the suit that was originally brought in Ohio. This contention is also without merit. While both suits seek to recover damages for the death of Harold T. Goranson, the suits are not identical.

Additional parties have been included in the suit brought in Virginia by Lawler, the ancillary administrator, and an additional count, based on breach of contract, has been included in that suit.

Moreover, the test set forth in 1404(a) for transferring an action to another district is whether a civil action "might have been brought" in the transferee court. This test or requirement is in no way qualified or eliminated by the language of the statute because a similar suit is pending in the transferee court.

The motion to remand this case to the United States District Court for the Northern District of Ohio is granted.

/s/ JOHN D. BUTZNER, JR.
United States District Judge

April 10, 1963

[Duly certified as a true and full copy by C. B. Watkins, Clerk of the United States District Court for the Northern District of Ohio, October 4, 1963, certificate omitted in printing.]

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IN THE

Supreme Court of the United States

October Term, 1963.

No. 56.

THE HONORABLE FRANCIS L. VAN DUSEN, Judge of the United States District Court for the Eastern District of Pennsylvania, EASTERN AIR LINES, INC., LOCKHEED AIRCRAFT CORPORATION, GENERAL MOTORS CORPORATION and THE UNITED STATES OF AMERICA,

Petitioners,

v.

ROBERTA BARRACK, Admx., etc., et al.,
SIDNEY W. POPKIN, et al.,
HOWARD H. RAPP, Admr., etc., et al.,
LEAH BIERNBAUM, Extrx., etc., et al.,
DORIS A. LAISTER, Extrx., etc., et al.,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

REPLY BRIEF FOR PETITIONERS.

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REPLY BRIEF FOR PETITIONERS.

The compelling need for reversal of the holding below is best illustrated by the recent decisions of *Goranson v. Capital Airlines, Inc.*, 221 F. Supp. 820 (E. D. Va., April 10, 1963) [1] and *Thompson v. Capital Airlines, Inc.*, 220 F. Supp. 140 (S. D. N. Y. May 1, 1963), both arising out of an aircraft crash at Charles City, Virginia.

In *Goranson* the domiciliary administrator's wrongful death suit had been transferred from the Northern District of Ohio to the Eastern District of Virginia, where other actions arising out of the same accident were pending. On the basis of the opinion of the Court of Appeals in the case at bar the transferee court remanded the action to Ohio since the domiciliary administrator had not applied for appointment in Virginia. The fact that another action for the death of the same decedent brought by a locally qualified administrator was also pending in the Eastern District of Virginia was deemed to be irrelevant (Brief for Respondents, Appendix, pp. 8a, 9a). Accordingly, two separate actions arising out of the same aircraft accident brought on account of the death of the same decedent remain pending in different district courts despite the language and purpose of Section 1404(a).

Cases arising from the same crash must also be tried in New York. In *Thompson v. Capital Airlines, Inc.*, 220 F. Supp. 140 (S. D. N. Y. 1963), the court concluded that three actions arising from the crash should be transferred to the Eastern District of Virginia. However, the court ordered transfer in only the one action in which the plaintiff was qualified under the law of Virginia. The court said that while it might disagree with the ruling of the

1. The decision in *Goranson* is cited at pages 28-31 and reproduced in full at pages 2a-9a of Brief for Respondents.

Court of Appeals in *Barrack v. Van Dusen*, transfer of the other two cases, in which the plaintiffs were not qualified to act in Virginia, would be futile since they would be remanded to New York as was done in *Goranson v. Capital Airlines, Inc., supra* (220 F. Supp. 140, 143).

Because of these two cases alone, separate suits must be maintained in three district courts in spite of the plain economies which would result from transfer and consolidation for efficient and consistent disposition in a single federal court. It is now indisputable that unless the decision below is reversed, needless and wasteful fractionalization of multiple action disaster litigation will result. This unwarranted result has already transpired subsequent to the decision below in the cases arising out of the Charles City, Virginia, crash.

As an alternate ground for affirmance, plaintiffs have advanced the contention that transfer would "gravely prejudice plaintiffs' substantive rights under the law of damages."

This contention is baseless. Two established principles of law each insure that the measure of damages will be the same irrespective of whether the cases are tried in Pennsylvania or Massachusetts.

First, the transferee district is required to apply the law of the transferor district, including its choice-of-law rules, in the trial of a case transferred under 1404(a). *H. L. Green Co., Inc. v. McMahon*, 312 F. 2d 650 (2d Cir. 1962); *Headrick v. Atchison, T. & S. F. Ry.*, 182 F. 2d 305 (10th Cir. 1950); *Gomez v. The S. S. Dorothy*, 183 F. Supp. 499 (D. Puerto Rico 1959); *Hargrove v. Louisville & N. R. R.*, 153 F. Supp. 681, 684 (W. D. Ky. 1957); *Greve v. Gibraltar Enterprises*, 85 F. Supp. 410, 414 (D. N. M. 1949).

The second is the rule of Pennsylvania law which would require the application of Massachusetts law if these cases are tried in the Eastern District of Pennsylvania. Under Pennsylvania choice-of-law rules, the law of the

place of injury governs both the cause of action[2] and the measure of damages.[3] The Massachusetts rule limiting recovery therefore would be applied regardless of the district in which these actions are tried.[4]

Pennsylvania courts will apply this rule even in face of plaintiffs' claim that its application would violate Pennsylvania's constitution and public policy and that this rule would not be applied by New York courts. The recent decision of the Court of Common Pleas of Philadelphia County in *Griffith, Executor, etc. v. United Air Lines, Inc.*, C. P. No. 6, June Term, 1962, No. 2013, is squarely in point. This was an action for the death of a resident of Pennsylvania arising from an aircraft accident in Colorado. Colorado law authorizes recovery of either compensatory damages not exceeding $25,000 or punitive damages of not less than $3,000 but not exceeding $10,000. *Colorado Annotated Statutes*, §§ 41-1-1 to 41-1-4. The Pennsylvania court ruled, in rejecting plaintiff's contention, that it is not contrary to the public policy of Pennsylvania to enforce the limitation on damages contained in the Colorado statutes.[5]

The decision of *Bednarowicz v. Vetrone*, 400 Pa. 385 (1960), compels the conclusion that the Supreme Court of Pennsylvania would reach the same result. Plaintiffs,

2. *Maxson v. McElhinney*, 370 Pa. 622 (1952); *Foley v. The Pittsburgh-Des Moines Co.*, 363 Pa. 1, 9 (1949); *Smith v. Pennsylvania R. R.*, 304 Pa. 294 (1931); *Hoodmacher v. Lehigh Valley R. R.*, 218 Pa. 21 (1907); *Usher v. West Jersey R.R.*, 126 Pa. 206 (1889).

3. *Rodney v. Staman*, 371 Pa. 1 (1952); *Rennekamp v. Blair*, 375 Pa. 620, 621, 622 (1954).

4. Application of the Massachusetts limitation is likewise compelled by the full faith and credit clause. Since Pennsylvania looks exclusively to the Massachusetts Death Act as creating the cause of action, the decisions of this Court teach that the limitations imposed on the cause of action by that Act must be given full faith and credit by Pennsylvania. *First National Bank v. United Air Lines*, 342 U. S. 396, 400-401 (1952); *Order of Travelers v. Wolfe*, 331 U. S. 586 (1947); *Bradford Elec. Co. v. Clapper*, 286 U. S. 145, 160 (1932). The Court of Appeals for the Second Circuit has disagreed. *Pearson v. Northeast Airlines Inc.*, 309 F. 2d 553 (2d Cir. 1962), *cert. denied*, 372 U. S. 912 (1963).

5. This is stated in the court's order sustaining defendant's preliminary objections to the complaint entered on October 7, 1963.

residents of Pennsylvania, were injured in Ontario, Canada, while passengers in an automobile owned and operated by defendant, also a resident of Pennsylvania. The suit was dismissed because under the law of Ontario plaintiffs had no cause of action, although they clearly would have had a cause of action if the accident happened in Pennsylvania. The Supreme Court of Pennsylvania affirmed. It held that the Constitution of Pennsylvania had no extraterritorial force, that plaintiffs' rights were governed by Ontario law, and that Pennsylvania public policy did not require a contrary result. To the contention that plaintiffs' cause of action would be recognized by the courts of Quebec, the Court replied:

> "[O]ur decisions on the question of Conflict of laws are irreconcilable with those recognized by some Canadian Courts and are directly in point and adverse to the plaintiffs." 400 Pa. 385 at 390.

It therefore is plain that respondents' reliance on decisions interpreting the law of New York is misplaced. That state's choice-of-law rule is quite different from that of Pennsylvania. For example, New York courts will apply New York law to create a cause of action for a New York resident who is injured in Ontario, Canada, while a guest in an automobile, even though the plaintiff has no cause of action under the law of Ontario. *Babcock v. Jackson*, 12 N. Y. 2d 473 (1963). Pennsylvania courts will not. *Bednarowicz v. Vetrone*, 400 Pa. 385 (1960). New York courts will not enforce a contractual limitation on recovery against New York residents even when the cause of action arises in a state in which the limitation is enforceable. *Conklin v. Canadian-Colonial Airways*, 266 N. Y. 244, 194 N. E. 692 (1935). Pennsylvania courts will enforce the limitation under these circumstances even though they would not enforce the limitation if the cause of action arose in Pennsylvania. *Hughes v. Pennsylvania Railroad Company*, 202

Pa. 222, 228-229 (1902); *Quaker Worsted Mills Corp. v. Howard Trucking Corp.*, 131 Pa. Super. 1, 8-9 (1938).

Further, the relevant constitutional provisions require one result in New York, but quite a different one in Pennsylvania. The New York Constitution, Article I, § 16, provides that the amount recoverable in a wrongful death action "shall not be subject to *any* statutory limitation" (emphasis supplied).[6] The Pennsylvania Constitution, Article III, § 21 provides that ". . . in no other cases shall the *General Assembly* limit the amount to be recovered for injuries resulting in death . . ." (emphasis supplied).[7] Obviously, the Pennsylvania provision evidences no public policy against the application, under normal choice-of-law rules, of law enacted by other state legislatures. To the contrary, the decisions of the Pennsylvania courts evince a strong policy in favor of enforcing the law of the state in which the cause of action arose. Rule 2207 of the Pennsylvania Rules of Civil Procedure goes so far as to require that the party instituting a wrongful death action be authorized to do so by the law of the jurisdiction in which the cause of action arose.

In *Knecht v. United States*, 242 F. 2d 929 (3d Cir. 1957), the Court of Appeals for the Third Circuit applied the Pennsylvania choice-of-law rule in specifically holding that a limitation on recovery to a maximum sum of $15,000 under the statute of the place of the injury was correctly applied by the District Court for the Eastern District of

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6. The entire section reads as follows:
"The right of action now existing to recover damages for injuries resulting in death, shall never be abrogated; and the amount recoverable shall not be subject to any statutory limitation."

7. As amended on November 2, 1915, this provision authorizes the General Assembly to enact workmen's compensation laws fixing the maximum and minimum limits of recovery. It then provides:
"but in no other cases shall the General Assembly limit the amount to be recovered for injuries resulting in death, or for injuries to persons or property, and in case of death from such injuries, the right of action shall survive, and the General Assembly shall prescribe for whose benefit such actions shall be prosecuted."

Pennsylvania.[8] Nor does the penal nature of the damages to be assessed under Massachusetts law indicate that Pennsylvania courts would authorize recovery of compensatory damages instead. To the contrary, Pennsylvania courts would dismiss the actions rather than fashion an alternate remedy if, as contended by plaintiffs, Pennsylvania courts would consider the cause of action to be penal in nature.[9] *Nesbitt v. Clark*, 272 Pa. 161 (1922); *Commercial Nat. Bank v. Kirk*, 222 Pa. 567 (1909).

The same contention which plaintiffs advance here was also rejected by the Court of Appeals for the Sixth Circuit in *Goranson v. Kloeb*, 308 F. 2d 655 (6th Cir. 1962). In that case the court declined to issue the writs of mandamus or prohibition against an order transferring an action for the death of an Ohio resident from Ohio to the Eastern District of Virginia where the aircraft crashed, even though Virginia law limits recovery to $30,000 and the Ohio Constitution expressly provides that there should be no limitation in the amount of recovery for wrongful death. The court reasoned that the law of Virginia would be applicable to the cases in any event because the settled law of Ohio would require the district court in Ohio to apply the law of Virginia, the state in which the crash occurred.

Other alternate grounds for affirmance advanced by respondents (Brief for Respondents, pp. 33-40), are clearly matters in the trial court's discretion on which plaintiffs have an opinion differing from that of the district court. It is significant that even the Court of Appeals would not have reviewed the decision of the district court on these

8. See also, *Curtis v. Campbell*, 76 F. 2d 84 (3d Cir. 1935), *cert. denied*, 295 U. S. 737 (1935), in which the court found that the Virginia wrongful death statute containing a limitation on recovery governed the rights of the parties.

9. Counsel for plaintiffs have persisted in describing the Massachusetts wrongful death statute as containing a "punitive restriction on damages." Brief for Respondents, p. 41. It is to be noted that it is the measure of damages which is considered to be penal, not the limitation on recovery. *Massachusetts Bonding & Ins. Co. v. United States*, 352 U. S. 128 (1956).

grounds. *United States v. Wright*, 282 F. 2d 428 (3d Cir. 1960); *All States Freight, Inc. v. Modarelli*, 196 F. 2d 1010 (3d Cir. 1952).

CONCLUSION.

The ruling of the Court of Appeals is erroneous and should be reversed.

Respectfully submitted,

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